No. 89-931

In The

Supreme Court of the United States

October Term, 1989

PORTLAND AUDUBON SOCIETY, *et al.*,

Petitioners,

v.

MANUEL LUJAN, JR., in his official capacity as Secretary, United States Department of Interior,

and

NORTHWEST FOREST RESOURCE COUNCIL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Ninth Circuit erred in determining that § 314 of the 1988 Department of the Interior and Related Agencies Appropriations bill bars judicial review in this case.

PARTIES BELOW

The following is a complete list of the parties named in the proceedings below:

Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon, and Natural Resources Defense Council, as plaintiffs-appellants below.

Manuel Lujan, Jr., in his official capacity as Secretary, United States Department of Interior, as defendant-appellee below.

Donald Hodel, in his official capacity as Secretary, United States Department of Interior, was a defendant-appellee below from 1987-1988.

Northwest Forest Resource Council, Huffman and Wright Logging Company, Freres Lumber Company, Inc., Lone Rock Timber Company, Inc., Scott Timber Company, Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Douglas County Forest Products, Medford Corporation, Rogge Forest Products, Inc., Association of O&C Counties, and Benton County, as defendant-intervenors-appellees below.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THE NINTH CIRCUIT'S DECISION THAT SECTION 314 STRIPS THE FEDERAL COURTS OF JURISDICTION TO HEAR PLAINTIFFS' NEPA CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT REGARDING JUDICIAL REVIEW 8

A. Section 314 By Its Express Terms Allows Judicial Review In This Case 8

B. The Ninth Circuit Did Not Find That Statutory Preclusion Of Judicial Review Is Demonstrated Clearly And Convincingly 11

1. The Ninth Circuit Previously Admitted § 314 Was Ambiguous And That There Is Substantial Doubt About Congressional Intent 12

2. Nothing In § 314 Indicates That Congress Intended To Bar This Lawsuit 14

3. Section 314 Is Not A Comprehensive Statute Meant To Govern All Judicial Review 15

4. The Ninth Circuit Improperly Relied On Committee Reports Accompanying The Reenactment Of § 314 To Alter Its Previous Interpretation 16

TABLE OF CONTENTS – Continued

Page

II. SECTION 314 SHOULD NOT BE ALLOWED TO REPEAL THE JUDICIAL REVIEW PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT 19

A. § 314 Is An Appropriations Measure Which Should Be Limited To Providing Funds For Authorized Programs..... 20

1. Both Senate And House Rules Prohibit Appropriations Measures From Changing Existing Law Unrelated To Funding 21

2. Section 314 Lacks The Clear Language Necessary To Repeal A Substantive Statute..... 22

B. An Appropriations Measure Cannot Repeal The Judicial Review Provisions Of The Administrative Procedure Act (APA) Except Under The Most Extreme Circumstances ... 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1966) 8, 12

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 8, 12

California Fish and Game Commission v. Hodel, 18 ELR 20141 (E.D. Cal. Oct. 29, 1989) 24

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 18

Kelly v. Robinson, 479 U.S. 36 (1986) 23

National Labor Relations Board v. United Food and Commercial Workers Union, 484 U.S. 112 (1987) 8, 12, 15, 16

Pierce v. Underwood, 108 S. Ct. 2541 (1988) 16

Portland Audubon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989) 2, 6

Portland Audubon Society v. Hodel, No. 87-1160-FR (D. Or. April 20, 1988) 2, 6, 14

Portland Audubon Society v. Lujan, 712 F. Supp. 1456 (1989) 2, 7

Portland Audubon Society v. Lujan, 884 F.2d 1233 (9th Cir. 1989) 1, 7

Speigel's Estate v. Commissioner of Internal Revenue, 335 U.S. 632 (1949) 23

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1977) 20, 21, 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Dickerson, 310 U.S. 554 (1940) 22

United States v. Klein, 80 U.S. 128 (1972) 15

United States v. Larionoff, 431 U.S. 864 (1977) 23

United States v. Lovett, 328 U.S. 303 (1946) 22

United States v. Will, 449 U.S. 200 (1980) 22

STATUTES

5 U.S.C. §§ 702-706 19

16 U.S.C. § 703 4

16 U.S.C. § 1531 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 5

42 U.S.C. § 4321 4

43 U.S.C. § 1181 4

43 U.S.C. § 1701 4

Pub. L. No. 99-500, Title I, § 101(h) [Title II, § 201], Oct. 18, 1986, 100 Stat. 1983 20

Pub. L. No. 99-591, Title I, § 101(h) [Title II, § 201], Oct. 30, 1986, 100 Stat. 3341 20

Pub. L. No. 100-446, Title III, September 27, 1988, 102 Stat. 1825 ..... 2, 6, 14, 17, 20

Pub. L. No. 101-121, § 318(b)(6)(A) 6, 14, 15, 20

Pub. L. No. 101-121, § 312, October 23, 1989 20

Pub. L. No. 100-202, § 101(g) [Title III, § 314], Dec. 22, 1987, 101 Stat. 1329 20

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS

House Rule XXI (2)(c) (1988) 21

Senate Rule XVI (1988) 21

LEGISLATIVE HISTORY

H.R. Conf. Rep. No. 101-264, 101st Cong., 1st Sess. 89 (Oct. 23, 1989) 15

S. Rep. No. 100-410, 100th Cong., 2d Sess. 122-123 (1988) 17

MISCELLANEOUS

54 Fed. Reg. 26,666 (June 23, 1989) 3

Rules of the House of Representatives, House Doc. 100-248 (1988) 21

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Portland Audubon Society, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled proceeding on September 6, 1989.

OPINIONS BELOW

The opinions of the Court of Appeals for the Ninth Circuit appear as *Portland Audubon Society v. Lujan*, 884

F.2d 1233 (9th Cir. 1989) and as *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989). These opinions are reproduced in the appendix hereto. Appendix A at A-1 and B at A-24. The first Order and Opinion of the United States District Court for the District of Oregon, *Portland Audubon Society v. Hodel*, No. 87-1160-FR (D. Or. April 20, 1988), reported only at 18 Envtl. L. Rep. 21210 (1988), is also reproduced in the appendix, Appendix D at A-125. The United States District Court's second Order and Opinion, *Portland Audubon Society v. Lujan*, 712 F. Supp. 1456 (1989) is reproduced in Appendix C at A-43.

JURISDICTION

Judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 6, 1989, denying judicial review of petitioners' claim for relief under the Administrative Procedure Act (APA). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which allows petitions for writ of certiorari after judgment of a court of appeals in any civil case.

STATUTE INVOLVED

The statute at issue in this case is § 314 of the Department of the Interior and Related Agencies Appropriations Act for the fiscal year 1989, Pub. L. No. 100-446, Title III, September 27, 1988, 102 Stat. 1825. Section 314 provides:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their

respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however,* That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further,* That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

STATEMENT OF THE CASE

This case challenges a 1987 decision of the Oregon State Director of the Bureau of Land Management (BLM) not to prepare a supplemental Environmental Impact Statement (EIS) to address the impacts of more than 200 timber sales on BLM lands. The sales will result in the clearcut logging of tens of thousands of acres of old growth forests, the habitat of the northern spotted owl (*Strix occidentalis caurina*). The owl was recently proposed for listing under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, because of the threat posed by logging. *See* 54 Fed. Reg. 26,666 (June 23, 1989). BLM decided to go forward with these timber sales in spotted owl habitat without addressing either the cumulative effects on the

owl or significant new concerns about the possible extinction of the species from such logging, as required by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370. The lawsuit also challenges BLM's decisions to proceed with logging of spotted owl habitat in violation of the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 *et seq.*, the Oregon and California Lands Act (OCLA), 43 U.S.C. § 1181, and the Federal Lands Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.*

Between 1979 and 1983 the Oregon Director of the BLM formulated timber management plans (TMPs) to regulate logging in the agency's seven western Oregon districts. Those TMP's were accompanied by seven separate EIS's required by NEPA to assess the impact of current and planned logging of forests. Those EIS's did not discuss the possibility that logging might lead to the extinction of the northern spotted owl. A number of scientific studies by government and private groups released since the time that BLM completed the EIS's, however, have made it clear that continued logging of old growth forests may well cause the spotted owl to become extinct.

On February 3, 1987, the Oregon State Director of the BLM issued a Spotted Owl Environmental Assessment (SOEA), which purported to review the significance of new information concerning the habitat requirements of the spotted owl. The SOEA, however, did not analyze or discuss any of the new information contained in the many studies of the northern spotted owl that have been released since the completion of the district EIS's. On April 10, 1987, the Oregon State Director of the BLM issued a decision not to prepare a supplemental EIS on

the effects of destruction of old growth forests in suitable spotted owl habitat.

On June 10, 1987, petitioners appealed the Director's decision to the Interior Board of Land Appeals (IBLA), and requested that the IBLA immediately stay sales of timber from stands older than 200 years within 2.1 mile radius circles identified on maps prepared by the defendant for each of the 289 known spotted owl habitat sites analyzed in the defendant's Spotted Owl Environmental Assessment. On July 1, 1987, the Interior Board of Land Appeals denied the petitioners' request for stay.

On October 19, 1987, petitioners filed a Complaint in federal district court for the district of Oregon. Appendix E at A-145. The Complaint sought declaratory and injunctive relief based upon the BLM's violations of NEPA, OCLA, FLPMA, and the MBTA. Jurisdiction over the case was conferred upon the district court by 28 U.S.C. § 1331.

On December 18, 1987, defendant moved to dismiss for failure to state a claim upon which relief could be granted. On January 8, 1988, petitioners moved for summary judgment. Defendant filed an amended motion to dismiss the same day. On February 28, 1988, the IBLA issued a decision upholding the BLM's decision not to supplement the EIS. On March 28, 1988, petitioners moved for a preliminary injunction. The motion to dismiss was heard on April 4, 1988, and granted on April 20, 1988.

The district court held that § 314 of the Department of the Interior and Related Agencies Appropriations Act

for fiscal year 1988[1] withdrew jurisdiction over this case. *Portland Audubon Society v. Hodel*, No. 87-1160-FR (D. Or. Apr. 20, 1988), Appendix D at A-125.

On April 21, 1988, petitioners filed a notice of appeal and moved on an emergency basis in the Ninth Circuit for an injunction pending appeal. The court granted the injunction on May 18, 1988, and ordered that the appeal be expedited. On January 24, 1989, the court of appeals reversed the district court in part, affirmed in part, and remanded to the district court for further proceedings to determine how to apply the "particular activities" language of § 314 to this case. *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), Appendix B at A-24.

Shortly after the court's remand, Portland Audubon Society renewed its motions for summary judgment and preliminary injunction and moved for a temporary restraining order. On February 8, 1989, the district court issued a temporary restraining order (TRO) against additional sales, and enjoined logging operations on sales just sold. The district court extended this TRO while it took evidence on the petitioners' renewed motion for summary judgment and preliminary injunction. On March 29, 1989, following a two-week hearing, the court granted petitioners' request for a preliminary injunction.

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[1] Section 314 was reenacted without change as H.R. 4867 and signed by the President on September 27, 1988, and is found in Pub. L. No. 100-446, 102 Stat. 1825-1826 and again reenacted without change as § 312 of H.R. 2788 and signed by the President on October 23, 1989, and is now found in Pub. L. No. 101-121.

The court heard oral argument on the cross-motions for summary judgment on April 24, 1989. On May 18, 1989, the court held that BLM had failed to address "the issues of adequate population size or the effects of habitat fragmentation upon the long-range survival of the spotted owl species." Appendix C at A-114-15. The court concluded that the decision not to supplement the EIS's "was arbitrary and capricious in light of the new, significant, and probably accurate information that the planned logging of spotted owl habitat raises uncertainty about the ability of the spotted owl to survive as a species." *Id.* The court, however, dissolved its preliminary injunction and granted summary judgment for the defendant, again on the basis that § 314 precluded judicial review. *Portland Audubon Society v. Lujan*, 712 F. Supp. 1456 (D. Or. 1989), Appendix C at A-43. On May 19, 1989, petitioners moved in the district court for an injunction pending appeal. When that was denied, petitioners sought from the Ninth Circuit, on an emergency basis, an injunction pending appeal. The Ninth Circuit granted petitioners' request on June 7, 1989.

On September 6, 1989 the Ninth Circuit affirmed the district court's ruling barring judicial review, but held the MBTA, OCLA, and FLPMA claims were not barred by laches and remanded the case for trial on those issues. *Portland Audubon Society v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), Appendix A at A-1. Petitioners seek a writ of certiorari for the Ninth Circuit's opinion that § 314 bars judicial review of defendant's compliance with NEPA.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION THAT SECTION 314 STRIPS THE FEDERAL COURTS OF JURISDICTION TO HEAR PLAINTIFFS' NEPA CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT REGARDING JUDICIAL REVIEW

The Ninth Circuit's opinion creates a direct conflict with the Court's prior holdings, which recognize a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). Indeed, this presumption represents part of the "very essence of civil liberty." *Id., quoting Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803) *and citing United States v. Nourse*, 9 Pet. 8, 28-29, 9 L.Ed. 31 (1835). Before this presumption may be overcome, "statutory preclusion of judicial review must be demonstrated clearly and convincingly." *National Labor Relations Board v. United Food and Commercial Workers Union* (NLRB), 484 U.S. 112, 131 (1987). If there is no express statutory language precluding review, then "[o]nly upon a showing of 'clear and convincing' evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1966) (*quoting Rusk v. Cort*, 369 U.S. 367, 379-80 (1961)).

The Ninth Circuit's opinion in this case ignores these rulings. The court's opinion finds that § 314, which specifically *allows* challenges to "any and all particular activities," nevertheless deprives the federal courts of

jurisdiction to hear plaintiffs' claims that the BLM violated NEPA when it decided to sell more than 200 particular proposed timber sales in critical spotted owl habitat.

A. Section 314 By Its Express Terms Allows Judicial Review In This Case.

Section 314 by its express terms prohibits *only* challenges to "plans in their entirety" based "solely" on new information. Section 314 expressly *reserves* the right to challenge "any and all particular activities." The Court of Appeals correctly concluded in its first opinion that:

> [c]ontrary to the district court's conclusion, the plaintiffs' complaint does not allege "that the plan in its entirety is outdated" or "solely . . . that the plan does not incorporate information available subsequent to the completion of the existing plan." Section 314. Instead, the plaintiffs seek, on a variety of grounds, to enjoin specific timber sales that have been authorized pursuant to the plans.

Appendix B at A-32-33. Thus, the court concluded, nothing in the language of § 314 expressly applies to this lawsuit.

Nevertheless, in its *second* opinion, the court concluded that the "underlying nature" of plaintiffs' grievance was a challenge to timber management plans. Appendix A at 16. The court based its decision *not* on the language of § 314 and plaintiffs' pleadings, but upon an *assumption* by the court as to plaintiffs' *motives* in this lawsuit. The court stated: "A supplemental EIS would, *plaintiffs hope*, result in a BLM decision to modify its land use decisions." Appendix A at 17 (emphasis added). This is a stunning basis for deciding that the language of § 314

applies to the case. If a court may ignore the specific savings language in § 314, *and* the actual pleadings in a case, and conclude that judicial review has been precluded because the court thinks plaintiffs' motives are something other than stated in the pleadings, then this Court's opinions on the presumptive availability of judicial review would have no impact on the decisionmaking of lower federal courts.

The stated purpose of the Spotted Owl Environmental Assessment challenged by plaintiffs in this case was

> to determine if there is significant new information concerning the northern spotted owl which is relevant to environmental concerns and [BLM's] seven western Oregon timber management plans. This document will also assess the impacts of mid-fiscal year 1987 (FY87) – FY90 timber sales on evaluated spotted owl habitat sites situated on timberlands in western Oregon.

BLM publicly disclosed in the SOEA for the first time that it had catalogued 289 spotted owl sites on its lands, and that it intended to sell more than 200 sales that would affect habitat within 2.1 miles of these sites.[2] These sales, which would represent the loss of nearly 10,000 acres of owl habitat, constitute in the aggregate less than one-quarter of BLM's overall planned timber sales volume from FY 1987 through FY 1990.

Plaintiffs' complaint is included as Appendix E to this brief. It does not challenge timber management

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[2] During the course of this litigation, BLM disclosed both that it is now aware of additional owl sites, and that it intends to sell additional sales within those sites.

plans, in their entirety or otherwise. It does not challenge land use decisions. It *does* challenge specific timber sales, as specifically allowed by § 314. *See* Appendix E at A-145. Even if judicial review were not presumptively available with respect to all BLM conduct not specifically insulated by the statute's prohibitory clause, plaintiffs' NEPA claim fits well within the permissive language of § 314.

The Ninth Circuit never addressed the precise match between plaintiffs' challenge and the judicial *savings* clause of § 314. Section 314 is quite clear: plaintiffs may challenge *"any and all"* particular activities. Nothing in § 314 limits judicial review to situations involving only a small number of activities, or to cases that have no effect in the real world, or to cases that have no effect on the volume of timber sold from BLM lands in Oregon.

The presumption favoring judicial review consistently reiterated by this Court for more than 185 years would be meaningless if lower courts could ignore savings clauses. Yet that is precisely what the Ninth Circuit did in this case: the court construed the limiting clause of § 314 broadly (rather than narrowly, as required by this Court), while ignoring the permissive clause altogether.

B. The Ninth Circuit Did Not Find That Statutory Preclusion Of Judicial Review Is Demonstrated Clearly And Convincingly.

The Ninth Circuit's decision that § 314 bars judicial review of plaintiffs' NEPA claim is contrary to this Court's previous opinions for at least four additional reasons. First, in stark contrast to its conclusion in this case, nearly a year ago the same court specifically found

that § 314 was "anything but clear." Second, Congress knows how to identify specific lawsuits when it wishes to do so, but did not do so in this case. Third, there is nothing in § 314's structure or legislative history to indicate that it is a comprehensive statute intended to preclude judicial review. Fourth, the court below improperly relied on committee reports accompanying the reenactment of § 314 to alter its original interpretation of § 314.

1. The Ninth Circuit Previously Admitted § 314 Was Ambiguous And That There Is Substantial Doubt About Congressional Intent.

This Court has repeatedly stated that where there is substantial doubt about congressional intent to preclude judicial review in a particular case, the presumption favoring judicial review is controlling. "Only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner, supra,* 387 U.S. at 141.[3] In its first opinion in this case, the Ninth Circuit

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[3] This Court's cases on preclusion of judicial review of administrative action have established that any "statutory preclusion of judicial review must be demonstrated clearly and convincingly." *National Labor Relations Board v. United Food and Commercial Workers Union,* 484 U.S. 112, 131 (1987). The preclusion analysis "begin[s] with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1985). If there is no express statutory language purporting to preclude review, then "[o]nly upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967).

specifically determined that § 314 was ambiguous. In that opinion the court concluded:

> The Section purports in one sentence to take away the jurisdiction of the district courts to hear challenges to "existing plans", while in a following sentence providing "further that any and all particular activities to be carried out under existing plans may nevertheless be challenged." The trial court interpreted this extraordinary language as a clear withdrawal of jurisdiction. *We find it anything but clear.*

Appendix B at A-29 (emphasis added). The court then examined the legislative history of § 314 and decided that "[s]ubstantial doubt about the congressional intent exists." Appendix B at A-34.

The court went on to say:

> [w]hen looking at the complaint as a whole it is difficult to avoid the conclusion that it challenges particular sales (activities) on grounds that remain available under the express terms of the very statute which the defendants rely. Accordingly, we must hold that the Section 314 savings clauses require the district court to decide how to apply the law to particular sales.

Appendix B at A-35.

Nothing has changed since this opinion was written. Plaintiffs have not amended their complaint or expanded the relief sought. The Ninth Circuit's second opinion, contradicting its first opinion and concluding that judicial review has been barred, is inexplicable, erroneous, and does not address why it felt its initial determination that § 314 does *not* preclude review in this case was wrong.

2. Nothing In § 314 Indicates That Congress Intended To Bar This Lawsuit.

This suit was filed more than 60 days before Congress enacted § 314. Had Congress intended § 314 to address this specific lawsuit it would have said so. An example of congressional intent to bar such a specific suit appears in the same Appropriations Bill in which § 314 was reenacted. Section 321 provides, in pertinent part:

> To ensure adequate availability of timber . . . and notwithstanding the injunction issued pursuant to the judgment in *National Wildlife Federation, et al. v. United States Forest Service, et al.*, (592 F. Supp. 931 (D. Ore. 1984) as modified by 801 F.2d 360 (9th Cir. 1986)), the Secretary of Agriculture is authorized to offer . . . merchantable timber . . . [and that] timber sales, roads and other associated activities . . . shall not be subject to administrative or judicial review . . .

Pub. L. 100-446, Title III, § 321, Sept. 27, 1988, 102 Stat. 1827.[4]

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[4] Similarly, in § 318 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990 Congress specifically states:

> Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section . . . is adequate consideration for the purposes of meeting the statutory requirements that are the basis for the case *Portland Audubon Society et. al. v. Manuel Lujan, Jr.*, Civil No. 87-1160-FR . . .

(Continued on following page)

Congress then reenacted § 314 without change in 1988, after this litigation had been pending for more than a year. *See* note 1, *supra*. Despite this fact, neither § 314 nor its legislative history refer to this particular litigation, or even the particular grounds for complaint asserted in it. Surely if Congress had wanted to address this specific litigation in § 314, it could have done so. It did not.

3. Section 314 Is Not A Comprehensive Statute Meant To Govern All Judicial Review.

Section 314 is but one paragraph in a massive, 450 page appropriations bill. The committees in the House and Senate which oversee judicial review never considered § 314. The committees in the House and Senate which oversee NEPA never considered § 314.

Section 314 is in no way like the comprehensive, integrated statutory scheme for judicial review considered by the Court in *National Labor Relations Board v. United Food & Commercial Workers Union*, 484 U.S. 112

(Continued from previous page)

Pub. L. No. 101-121, § 318(b)(6)(A). Congress made clear, however, that § 318 should not be interpreted to moot this case.

> Nothing in this section is intended to prejudge . . . any final decisions that may be reached by a Federal court in . . . *Portland Audubon v. Lujan* . . . "

H.R. Conf. Rep. No. 101-264, 101st Cong., 1st Sess. 89 (Oct. 23, 1939) (accompanying Pub. L. No. 101-121). Plaintiffs are challenging the constitutionality of this provision under the holding of this Court in *United States v. Klein*, 80 U.S. 128, 147 (1972), that Congress may not prescribe a rule of decision in a pending case.

(1987). In *NLRB* the Court determined that where there is no statutory language expressly precluding APA review, the Court may nevertheless conclude from the structure and history of the statute that Congress intended to bar judicial review. In contrast to *NLRB*, the Ninth Circuit decision in this case allows a single paragraph in a massive appropriations measure to repeal the clear, comprehensive, and directly applicable judicial review provisions of the APA. Rather than substituting one comprehensive scheme of judicial review for another, as was the case in *NLRB*, the Ninth Circuit's decision in this case replaces the APA's comprehensive scheme for judicial review with a single ambiguous paragraph that is "anything but clear." Appendix B at A-29.

4. The Ninth Circuit Improperly Relied On Committee Reports Accompanying The Reenactment Of § 314 To Alter Its Previous Interpretation.

This Court explained in *Pierce v. Underwood*, 108 S. Ct. 2541 (1988), that "it is the function of the courts and not the Legislature . . . to say what an enacted statute means." *Id.* at 2551. In *Pierce*, the Court refused to allow a committee report accompanying a reenactment of statutory language to alter an interpretation of the language that courts had adopted prior to the reenactment. The Court recognized that such statements cannot "reasonably be thought to be" "an authoritative expression of what the [earlier] Congress intended," since

> it is not an explanation of any language that the [later] Committee drafted, because on its face it accepts the [earlier] meaning of the terms as

> subsisting, and because there is no indication whatever in the text or even the legislative history of the [later] reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the [earlier] legislation.
>
> *Id.* at 2551.

In its first opinion, the Ninth Circuit correctly relied upon the legislative history that accompanied § 314 when it was adopted in 1987. Although § 314 had been readopted in 1988, prior to the January 24, 1989, date of the Ninth Circuit's first opinion, and all parties had briefed the 1988 reenactment to the court, the Ninth Circuit's first opinion correctly focused on the more relevant legislative history – that accompanying the enactment of § 314 in 1987.

In its *second* opinion, however, the Ninth Circuit relies upon the Senate report accompanying the 1988 reenactment as authority for its decision to change its prior judicial interpretation of the statute's meaning.[5] Without mentioning the original legislative history discussed in its first opinion, the court relies on the 1988 Senate report for the proposition that the "particular activities" language limits challenges to individual sales to challenges involving only "site-specific" concerns. Appendix A at A-15. But this reads all meaning out of the

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[5] The 1988 Conference Report on the September 27, 1988, reenactment of § 314 of Pub. L. 100-446, Title III, H.R. Conf. Rep. 862, 100th Cong., 2d Sess. 76 (1988), and the 1988 Senate Report (S. Rep. No. 100-410, 100th Cong., 2d Sess. 122-123 (1988)) do not propose any change in § 314.

savings clause in § 314. According to the court's use of the post-enactment Senate Report, site-specific concerns may not include *any* concerns that might *also* apply to other sites. This directly contradicts the specific language in § 314 preserving the right to challenge "any and all particular activities." It also contradicts the language of the Conference Committee Report accompanying § 314 when it was initially adopted, which stated:

> existing plans may not be challenged solely on the basis that the plans are outdated or that there is new information, *unless the claim includes information as to substantive concerns related to the new information. Any particular activities, such as individual timber sales, may continue to be challenged as always.*

Conference Report No. 498, 100th Cong., 1st Sess. at 925 *quoted in* the Ninth Circuit's first opinion, Appendix B at A-34 (emphasis in court's opinion).

"[S]ubsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 fn. 13 (1980). The Ninth Circuit's first opinion, based on the language of the statute and the legislative history of its enactment, correctly concluded that the language of § 314 was ambiguous and that there was substantial doubt that Congress intended § 314 to preclude judicial review in this case. The Ninth Circuit's second opinion, for which petitioners seek certiorari, incorrectly relied on subsequent legislative history to alter its original interpretation of § 314.

II

SECTION 314 SHOULD NOT BE ALLOWED TO REPEAL THE JUDICIAL REVIEW PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act, 5 U.S.C. §§ 702-706, clearly and unequivocally provides for judicial review in this case. No party or lower court opinion denies this fact. Since the Ninth Circuit's opinion concludes that § 314 does not allow judicial review in this case, the opinion necessarily means that § 314 has repealed the APA, at least insofar as it applies to this case. This Court has never allowed an amendment to an appropriations bill to repeal existing substantive legislation such as the APA.

The Ninth Circuit allowed § 314 to repeal the judicial review provisions of the APA despite the fact that the standing rules of the House and Senate expressly prohibit the repeal by appropriation measure of existing law unrelated to appropriations. The Ninth Circuit allowed § 314 to repeal the judicial review provisions of the APA despite the fact that this Court has sustained repeals by appropriations measures *only* when the underlying law concerned government funding and the repealing measure's language evinced clear congressional intent to repeal. And the Ninth Circuit allowed § 314 to repeal the judicial review provisions of the APA despite this Court's admonition to sustain judicial review unless Congress clearly and unambiguously precludes such review. Unless review is granted in this case, the Ninth Circuit's opinion will only encourage a disturbing trend towards using the

appropriations process to selectively preclude judicial review of compliance with substantive legislation.[6]

A. Section 314 Is An Appropriations Measure Which Should Be Limited To Providing Funds For Authorized Programs.

Although substantive statutes such as the APA and the appropriations bill of which § 314 is a part are both congressional acts, this Court has recognized that they represent two distinct types of legislation. Appropriations measures "have the limited and specific purpose of providing funds for authorized programs." *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153, 190 (1977). In *TVA* this Court stated that if appropriations measures were "pregnant with prospects of altering substantive legislation," it would "lead to the absurd result of requiring [Congress] to review exhaustively the background of every authorization before voting on an appropriation." *Id.* Accordingly, the Court rejected the argument that appropriations to complete the Tellico Dam Project had impliedly repealed the provisions of the Endangered Species Act (ESA). The Ninth Circuit's second opinion in this

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[6] Limitations on judicial review have increasingly been included in appropriations measures. *See, e.g.*, Pub. L. No. 101-121, § 318(b)(6)(A), October 23, 1989; Pub. L. No. 101-121, § 312, October 23, 1989; Pub. L. 100-446, Title III, § 314, Sept. 27, 1988, 102 Stat. 1825; Pub. L. 100-446, Title III, § 321, Sept. 27, 1988, 102 Stat. 1825; Pub. L. 100-202, § 101(g) [Title III, § 314], Dec. 22, 1987, 101 Stat. 1329; Pub. L. 99-591, Title I, § 101(h) [Title II, § 201], Oct. 30, 1986, 100 Stat. 3341; Pub. L. 99-500, Title I, § 101(h) [Title II, § 201], Oct. 18, 1986, 100 Stat. 1783.

case allows the very type of implied repeal that this Court specifically prohibited in *TVA*.[7]

1. Both Senate And House Rules Prohibit Appropriations Measures From Changing Existing Law Unrelated To Funding.

Both houses of Congress have enacted standing rules which prohibit changing existing substantive law by appropriations measures. The Senate prohibits amendments to general appropriations bills which "propos[e] new or general legislation." Senate Rule XVI (1988). Similarly, the House of Representatives provides that "[n]o amendment to a general appropriation bill shall be in order if changing existing law." House Rule XXI (2)(c) (1988). The commentary to the House rule states that amendments proposing the "repeal of existing law . . . [have] been ruled out." Rules of the House of Representatives, House Doc. 100-248 at 599 (1988).

This Court has previously relied upon the fact that congressional rules prohibit the use of appropriations measures to repeal substantive law to find that an apparent attempt to repeal was not sufficiently direct. *See TVA*, 437 U.S. at 191. Those same congressional rules should be applied in the same manner in this case. The Court should look with skepticism on any reading of § 314 that would necessarily mean that the Senate and House broke their own internal rules.

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[7] As in *TVA*, the repeal in this case is not of the entire underlying substantive statute, but of its applicability in a particular case.

2. Section 314 Lacks The Clear Language Necessary To Repeal A Substantive Statute.

This Court has frequently admonished that a clear intent to repeal must be manifest in the repealing act itself, and the Court has found such repeals *only* when the underlying legislation affected by the later appropriations bill was itself *related to government spending*. In *United States v. Dickerson*, 310 U.S. 554, 555 (1940), for example, the Court found that an appropriations act clearly suspended benefits provided under a separate statute for army re-enlistment bonuses. In *United States v. Will*, 449 U.S. 200 (1980), the Court found "the *plain words* of the [appropriations act] reveal an intention to repeal" federal officials' salary rates under a separate act. 449 U.S. at 222 (emphasis added). In contrast, the Ninth Circuit conceded in this case that the language of § 314 is "anything but clear" and that "nothing in section 314 implies the repeal of any law." Appendix B at A-29, A-36. And there is no dispute that the underlying substantive legislation in this case (the APA) is not a "spending" statute.

B. An Appropriations Measure Cannot Repeal The Judicial Review Provisions Of The Administrative Procedure Act (APA) Except Under The Most Extreme Circumstances.

While the Court has allowed use of the appropriations process to amend existing *spending* legislation,[8] in

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[8] *See, e.g., United States v. Lovett*, 328 U.S. 303 (1946) (1943 Urgent Deficiency Appropriation Act amendments held an

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no other case has this Court permitted an appropriations measure to repeal a substantive statute unrelated to government spending. In fact, the Court has expressed concern that appropriations measures that differ in subject matter from statutes they purport to repeal reflect only the views of a few members of Congress. *TVA*, 437 U.S. at 190-91. As the Court stated in *Kelly v. Robinson*, 479 U.S. 36, 51 (1986), "If Congress had intended [to change existing law], 'we can be certain that there would have been hearings, testimony, and debate concerning consequences so inimical to purposes previously deemed important, and so likely to arouse public outrage.'" (*quoting TVA, supra*, 437 U.S. at 209 (Powell, J., dissenting)).

Thus the Court's general rule disfavoring repeals by implication applies "with *greater* force when the claimed repeal rests solely on an appropriations act." *TVA*, 437 U.S. at 190. The *TVA* Court noted that appropriations committees have no jurisdiction over the subject matter of statutes that do not concern government financing, nor do they conduct the extensive hearings which customarily precede passage of substantive statutes. *Id.* at 191.

The appropriations subcommittee that drafted § 314 had no subject matter jurisdiction over grants of judicial review and did not hold hearings to discuss the

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unconstitutional repeal of three federal employees' salaries); *Speigel's Estate v. Commissioner of Internal Revenue*, 335 U.S. 632 (1949) (1932 Revenue Act amendments allowed to repeal IRS decedents' estates provisions); *United States v. Larionoff*, 431 U.S. 864 (1977) (appropriations measure providing for army personnel selective re-enlistment bonuses allowed to repeal existing bonus statute).

consequences of repealing affirmative judicial review rights under the APA. As the *TVA* Court recognized, Congress "would be somewhat surprised to learn that [its] careful work on the substantive legislation had been undone by the simple – and brief – insertion of inconsistent language" in an appropriation measure. 437 U.S. at 191.

It is ironic that the Justice Department, which is taking the position in this case that it is acceptable for an appropriations bill to repeal substantive legislation, specifically argued in another case that such repeals were inappropriate. In *California Fish and Game Commission v. Hodel*, 18 ELR 20141 (E.D. Cal. Oct. 29, 1989), the State of California sought to invalidate Fish and Wildlife Service (FWS) regulations requiring the use of non-lead shot in waterfowl hunting areas to protect bald eagles. At issue was an appropriations act amendment – the Stevens Act – which denied the FWS funds to implement its regulation. The Justice Department argued that the Stevens Act should not be given effect because a) the amendment did not "refer in any way" to the substantive statutes authorizing the FWS to protect bald eagles; b) the effect sought by California was not expressly stated in the Stevens Act; and c) the Act was contained in "an appropriations bill, not substantive legislation" dealing with the substantive statutes purportedly repealed. The court agreed with the Department of Justice, and refused to allow the appropriations measure to repeal substantive statutes giving FWS authority to protect bald eagles by outlawing lead shot.

The inconsistency in the Department of Justice position on this issue illustrates why certiorari is appropriate.

The Court should clarify, for the benefit of lower courts and the Justice Department, how its rules on implied repeals and preclusion of judicial review apply in the context of appropriation act attempts to repeal the judicial review provisions of the APA.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

DATED: December 5, 1989

Respectfully submitted,

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APPENDIX INDEX

Appendix	*Page*	*Document*
A	A-1	Opinion of the United States Court of Appeals for the Ninth Circuit, *Portland Audubon Society v. Lujan*, September 6, 1989
B	A-24	Opinion of the United States Court of Appeals for the Ninth Circuit, *Portland Audubon Society v. Hodel*, January 24, 1989
C	A-43	Order and Opinion of the United States District Court for the District of Oregon, *Portland Audubon Society v. Lujan*, May 18, 1989
D	A-125	Order and Opinion of the District Court for the District of Oregon, *Portland Audubon Society v. Hodel*, April 20, 1988
E	A-145	Complaint for Declaratory and Injunctive Relief, *Portland Audubon Society v. Hodel*, No. CV-87-1160-FR, October 17, 1987

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PORTLAND AUDUBON SOCIETY; HEADWATERS; THE WILDERNESS SOCIETY; SIERRA CLUB, INC.; SISKIYOU AUDUBON SOCIETY; CENTRAL OREGON AUDUBON SOCIETY; KALMIOPSIS AUDUBON SOCIETY; SALEM AUDUBON SOCIETY; UMPQUA VALLEY AUDUBON SOCIETY; NATURAL RESOURCES DEFENSE COUNCIL; LANE COUNTY AUDUBON SOCIETY; OREGON NATURAL RESOURCES COUNCIL,

Plaintiffs-Appellants,

v.

MANUEL LUJAN, JR., in his official capacity as Secretary, United States Department of Interior;

Defendant-Appellee,

and

NORTHWEST FOREST RESOURCE COUNCIL; HUFFMAN AND WRIGHT LOGGING COMPANY, et al.; ASSOCIATION OF O & C COUNTIES, et al,; DOUGLAS COUNTY FOREST PRODUCTS, et al.,

Defendants-Intervenors-Appellees.

No. 89-35337

D.C. No. CV 87-1160-FR

OPINION

(Filed Sep. 6, 1989)

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted August 17, 1989
San Francisco, California

Decided September 6, 1989

Before: GOODWIN, Chief Judge, SCHROEDER and PREGERSON, Circuit Judges.

Opinion by Judge Goodwin

GOODWIN, Chief Judge:

On remand from this court's decision in *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), the district court took testimony, examined exhibits, reviewed the applicable law, and concluded that section 314 of Pub. L. No. 100-446, 102 Stat. 1825 (1988), barred plaintiffs' National Environmental Protection Agency (NEPA) claim. The district court also concluded that plaintiffs' other claims were untimely. Plaintiffs were seeking to enjoin the removal of timber from certain government-owned lands pursuant to current Timber Management Plans (TMPs) and their respective annual allowable harvest targets. After staying further logging pending this expedited appeal, we have reviewed the record, the briefs and arguments, and we affirm the district court's denial of relief on the NEPA claim. We remand plaintiffs' other claims for further proceedings.

The Timber Management Plans

From 1979 to 1983, the Bureau of Land Management (BLM) adopted ten-year plans for each of its districts in western Oregon. These Timber Management Plans

(TMPs) were received in evidence as exhibits. Each was the result of a lengthy process that included the preparation of an Environmental Impact Statement (EIS) as required by the NEPA, 42 U.S.C. § 4332. Each EIS considered the environmental impacts of possible timber management alternatives, including "maximum timber production," "no change [from present management]," "no herbicide," "emphasis on protection of natural values," "habitat diversity," as well as management alternatives which would compromise among these concerns.

Among the numerous environmental impacts studied under each alternative was the depletion of northern spotted owl habitat and the resulting predicted decline in the number of owls on BLM lands.

Each TMP adopts one of the alternatives proposed in the EIS, though perhaps with slight modifications. The TMPs designate commercial forest land under BLM management in the district for one of several uses. For example, the Roseburg District TMP, adopted September 30, 1983, sets aside 82 percent of the commercial forest land area for "intensive timber management." Another 9 percent is to be managed for "modified area control," which allows some timber harvest while protecting some old-growth timber and visual corridors.[1] An additional 9

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[1] Land that will support a sustainable annual yield of 20 cubic feet of timber per acre is considered "commercial forest land."

"Intensive timber management" in Pacific Northwest old-growth forests includes clearing the land of centuries old trees,

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percent of the commercial forest land is withdrawn from timber production altogether, because the land is in riparian areas, because it is fragile and incapable of supporting sustained yield timber management, or because the land is reserved for endangered species habitat or for recreation.

Although the TMPs do not designate specific timber sale boundaries, or require that BLM sell any particular acre of timber, they effectively decide the land use allocation of the forest and set the "annual allowable harvest" for each district. BLM timber sales are carried out in accordance with the plans. Each timber sale requires an Environmental Assessment which is "tiered" to the EIS

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replacing these with uniform-age new growth, and then forest management to culminate in harvesting in 40 to 80 year cycles depending on the growth characteristics of each "second growth" forest.

"Visual corridors" refers to the practice of leaving a corridor of uncut trees along a highway so that an unsightly clear cut is not visible to the automobile driver.

Plaintiffs remind us that the TMPs do not designate any particular timber sales, or require that any particular timber be cut. The nature of timber harvesting does not lend itself to specific designations until market access, fire, insect invasion and other factors are taken into account. *See, e.g., Oregon Natural Resources Council v. Lyng*, No. 88-4092, slip op. 7949 (9th Cir. July 21, 1989)(timber sale necessitated by bark beetle infestation which followed violent storm). A particular stand of timber can be cut only once every 40 to 80 years, and the ten-year TMPs do not determine which exact stand of timber will be cut in which year. The plans do, however, determine which areas will be devoted to timber production and which to other uses.

for the TMP. In other words, when BLM sells an individual timber sale, it does not revisit the difficult trade-offs and decisions that were made in the TMP, deciding what land is to be designated for "intensive timber management." The Environmental Assessment considers site-specific concerns about how the sale is to be undertaken in accordance with BLM management practices: where roads are to be built, how the site is to be prepared, how to mitigate the environmental impact of the sale by reducing erosion, muddying of nearby waters, or an overly visible, unsightly cut.

In 1986, BLM decided to replace all of the current western Oregon TMPs with new, coordinated plans by the end of the decade. The EISs for the next generation of plans are currently being prepared and, if all goes according to schedule, should be completed in 1990. *See Portland Audubon Society v. Lujan*, 712 F. Supp. 1456, 1460-61 (D.Or. 1989).

The Northern Spotted Owl

The northern spotted owl is heavily dependent on old-growth timber for its habitat. The owl is considered an "indicator species" for old-growth forest, meaning that the presence and number of northern spotted owls give an accurate indication of the health of the old-growth forest and the presence of other old-growth dependent species. As go the owls, naturalists say, so go the other species.

Almost no old-growth forest remains on private lands in western Oregon. Most of the remaining old-growth timber is on federal land managed by the Forest

Service and BLM. BLM lands account for approximately one-fifth of the remaining old-growth timber.

During preparation of the 1979-1983 EISs and TMPs, the preparers recognized that the TMPs called for accelerated harvesting of much remaining old-growth timber, and that the number of nesting pairs of spotted owls would decline as this harvesting took place. The EISs and TMPs reflect this concern, and attempt to make provisions for the preservation of a specified number of owl pairs.

In the mid-1980s, several studies expressed concern for the long-term viability of the northern spotted owl species. Dr. Russell Lande of the University of Chicago completed a much-debated study on the likely extinction of the owl. The National Audubon Society commissioned an independent report which concluded that extinction is a possibility because of the owl's dependence on old-growth forest and its low rates of reproduction even in undisturbed forest.

At the request of environmental groups, including plaintiffs in this litigation, BLM prepared an Environmental Assessment in order to determine whether, in light of new information about the owl, supplemental EISs should be prepared for the TMPs. BLM provided interim protection for owl sites pending completion of the Environmental Assessment. The Spotted Owl Environmental Assessment was completed on February 3, 1987. It concluded that any new information about the owl was too preliminary to support preparation of a supplemental EIS, and that the impacts of planned timber sales on

spotted owl habitat were no worse than had been predicted under the original EISs. On April 10, 1987, BLM issued its decision not to prepare a supplemental EIS on the owl, finding that a supplemental EIS would not serve any purpose because

> [t]he conclusions of the [Spotted Owl Environmental Assessment] indicate that by the time BLM completes new resource management plans for western Oregon, more spotted owl habitat will be available than had been predicted to survive in the EISs, and substantial options for protecting the spotted owl population on BLM lands can be addressed in the new [resource management plans] and related EISs at that time. The analysis also shows that 913,000 acres of unsold old growth and mature timber now in existence on BLM lands in western Oregon will be reduced by no more than 9% by October 1990, leaving 91% of that particular habitat that exists today available for planning options for the [resource management plans] scheduled for completion in 1990.

Portland Audubon Society appealed this decision to the Interior Board of Land Appeals and requested immediate stay of timber sales near identified spotted owl nests. The Interior Board of Land Appeals eventually, on February 28, 1988, upheld the decision not to prepare a supplemental EIS. Meanwhile, on October 19, 1987, plaintiffs had filed this action alleging violations of NEPA, the Oregon & California Lands Act (OCLA), 43 U.S.C. § 1181, the Federal Lands Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 et seq., and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703 et seq.

The district court entered judgment for defendants on April 20, 1988, after granting defendants' motion to

dismiss pursuant to Fed. R. Civ. P. 12(b)(l) and 12(b)(6), on the ground that judicial review of plaintiffs' claims was barred by section 314 of the 1987 interior continuing budget resolution. *See* Continuing Resolution, H.R. Res. 395, § 314, Pub. L. No. 100-202, 101 Stat. 1329-254. That section was reenacted without change in 1988 as section 314 of Pub. L. No. 100-446, 102 Stat. 1825.[2] The district court relied on legislative history, particularly the 1987 Senate Report, S. Rep. No. 100-165, 1st Sess. 11-12 (1987), indicating that sponsors of section 314 intended to bar this very lawsuit. The district court characterized this as an action brought "on the sole basis of new information

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[2] Section 314 provides:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of existing lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however,* That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further,* That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

concerning the northern spotted owl." The district court did not discuss whether this suit was one challenging particular activities to be carried out under the existing plans, which challenge section 314 expressly permits.

PAS I

We reversed and remanded. *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989)("*PAS I*"). We found the language of section 314 "anything but clear" and cautioned that the court must examine the language of the statute and assess whether, following principled methods of statutory interpretation, the withdrawal of jurisdiction bars each of plaintiffs' claims.

Section 314 prohibits challenges to a BLM plan "solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan." At the same time, it allows challenges to "any and all particular activities to be carried out under existing plans."

With regard to the NEPA claim, the district court had not considered whether this suit is a challenge to the plans barred by section 314, or a challenge to "particular activities" to be carried out under the plans. Because the plaintiffs attack numerous sales, the NEPA claim has the effect of an attack on the plan, yet it is phrased in terms of particular activities: plaintiffs seek to enjoin several hundreds of timber sales planned within 2.1 miles of owl sites. We did not resolve the "particular activities" issue, noting that the district court had not addressed whether timber sales are "particular activities" under section 314.

We remanded so that the district court could make that determination.

Remand

On remand and after further factual development, the district court held that plaintiffs' non-NEPA claims were barred by the equitable doctrine of laches. *Portland Audubon Society v. Lujan*, 712 F. Supp. at 1482-84. The district court noted that the OCLA and FLPMA claims, 43 U.S.C. §§ 1181, 1701 et seq., challenge the Oregon BLM Director's 1983 Forest Resources Policy Statement (FRPS) requiring that all lands suitable for timber production be managed for timber and wood product production, to the extent possible under the requirements of law. *Id.* Similarly, according to the district court, the MBTA claim, 16 U.S.C. § 703, is based on "predictions of the demise of the spotted owl made in the [EISs] issued between 1979 and 1983." *Id.* The court concluded that

> the [Administrative Procedure Act] does not provide a basis for a challenge by [plaintiffs] to administrative decisions made over five years ago and upon which the BLM has operated without objection. In sum, since [plaintiffs] failed to pursue its claims under OCLA, FLPMA and the MBTA in a timely manner, they are not subject to this court's review under the APA.

Id. at 1484.

On remand of the NEPA claim, the court held that BLM's decision not to prepare a supplemental EIS in 1987 was not subject to judicial review in these proceedings. The court held that the suit was a challenge to the plans and not to "particular activities to be carried out under

existing plans," and further, that the NEPA claim was based upon "new information." The court held the NEPA claim barred and granted summary judgment to BLM. *Id.* at 1485-89.

After unsuccessfully seeking a stay pending appeal in the district court, plaintiffs appealed and sought a stay pending appeal in this court. After considering the voluminous motion papers filed by all sides, we granted the stay and expedited the appeal, with briefing limited to the issues considered in the opinion of the district court.

Section 314

The district court's finding that plaintiffs' NEPA claim is based on "new information" is not contested in this appeal. Instead, the argument is focused on whether plaintiffs challenge the plans or "particular activities to be carried out under the existing plans."

Plaintiffs' NEPA claim is not phrased as a *direct* challenge to the existing plans. This does not, however, end the inquiry. If it did, we would not have remanded the case in order for the district court to determine how to apply the "particular activities" language to plaintiffs' NEPA claim.

The district court reads section 314 as barring any challenge to a sale unless a plaintiff can demonstrate new information "site-specific" to that timber sale. Plaintiffs argue that they have met even this test: they have identified specific sales that include old-growth timber in close proximity to an owl nest. Their new information is, they say, specific to each of these sales and their challenge thus

has no bearing on BLM's other sales unless they also contain owl habitat.

In describing plaintiffs' claim as an attack on the plans, the government and the district court both begin with the text of section 314, as well as the legislative history of section 314. The district court attempted to "give meaning to the statute as a whole and avoid rendering any part of the statute inoperative or insignificant." *Portland Audubon Society v. Lujan*, 712 F. Supp. at 1488. The court interpreted section 314's language that "[t]he Forest Service and [BLM] . . . may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans" as expressing the affirmative intent of Congress to "prevent those kinds of disruptions to existing [TMPs] that preclude a smooth transition from one planning period to another." *Id.* This may be true, but a congressional intent that there be a "smooth transition from one planning period to another" is not specific enough to serve as a jurisdictional bar or to indicate how we should interpret the jurisdictional withdrawal provision contained in the latter part of section 314.

We do not find the above-quoted language of section 314 very helpful. The entire sentence reads:

> Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending completion of new plans.

This sentence, when read in its entirety, does not seem to be part of section 314's jurisdictional bar, but more likely was intended to excuse the Forest Service and BLM from failure to complete their new plans on schedule. Section 6(c) of the NFMA, 16 U.S.C. § 1604(c), requires the Forest Service to complete its new plans by September 30, 1985. While the statute does not cite any deadline that similarly constrains BLM, BLM did decide in 1986 that it would replace the current western Oregon plans in 1990. Were a plan to become invalid or subject to challenge "on its face" if it becomes "outdated" – in the same manner as an expired driver's license or passport – no timber sales or other actions could be tiered to the plan EIS, and the management scheme would collapse in chaos. We cannot say whether, in the absence of section 314, the Forest Service plans would have become void after September 31, 1985.[3] Assuming that Congress intended, in a continuing budget resolution, to declare that the plans had not expired or become "outdated," language addressing the timing of transition to new plans does not help determine whether these plaintiffs, in this case, are challenging the plans or "particular activities."

We agree, however, with the district court and the government that the 1988 legislative history gives some support to the BLM interpretation of section 314 as barring this claim. The conference committee report provides

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[3] This case does not challenge Forest Service resource plans or timber sales, and we do not reach the question of section 314's effect on the Forest Service. The language and history of section 314 is not identical for the BLM and the Forest Service.

that section 314 "is not intended to preclude case-by-case timber sale appeals in site-specific instances." H.R. Conf. Rep. 862, 100th Cong., 2d Sess. 76 (1988). The Senate Report explains further, however, that a challenge to a particular sale may be barred if it is in effect an indirect challenge to a plan.

> Legal challenges to particular activities, such as individual timber sales, are specifically exempted from this prohibition against legal challenges to existing plans so long as the challenge to the particular activity is not in effect an indirect challenge to an existing plan.

S. Rep. No. 100-410, 100th Cong., 2d Sess. 122-123 (1988). These committee reports suggest that, in the context of decisions about timber harvesting, the "particular activities" language in section 314 refers to individual timber sales and protest procedures available under 43 C.F.R. § 5000 et seq.[4] Because the environmental assessments

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[4] We reject plaintiffs' argument that *Pierce v. Underwood*, 108 S.Ct. 2541 (1988), prevents us from considering legislative history accompanying the 1988 reenactment, without change, of section 314. *Underwood* considered the meaning of the term "substantially justified" in the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The EAJA was reenacted, without change, in 1985. The House committee report suggested a meaning of "substantially justified" which contradicted "the almost uniform appellate interpretation" prior to the reenactment. The Court relied upon the rule that a reenactment without change "generally includes the settled judicial interpretation." 108 S.Ct. at 2551 (citation omitted). The Court remarked that, "[q]uite obviously, reenacting precisely the same language would be a strange way to make a change." *Id.*

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that accompany individual timber sales are tiered to the EISs for the larger plans, so long as the EIS for the plan adequately addresses cumulative environmental impacts, any challenge to an individual sale will be limited to site-specific concerns.[5] Plaintiffs' NEPA claim is not such a challenge.

We need not consider in this litigation which "particular activities" other than those related to timber sales remain open to challenge, as plaintiffs do not challenge any non-timber-related activities. We also need not consider whether section 314 would bar a challenge that raises cumulative concerns in the context of an individual sale. That issue is raised with regard to Forest Service timber sales in another case currently pending before us, *Oregon Natural Resources Council v. Mohla*, No. 89-35350.

As we remarked in *PAS I*:

> The defendants argue that because the plaintiffs seek to enjoin every planned sale that includes old-growth timber within a 2.1-mile radius of an owl habitat, the attack is essentially an attack on

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Further, in *Underwood* the House committee authoring the 1985 report did not draft the language in question, and the committee report urged adoption of an "unadministerable" standard, "out of accord with prior usage."

Here, the 1988 legislative history does not contradict any prior judicial interpretation, and Congress did not reenact the same language in order to make a change.

[5] A recent decision from the District of Oregon involving a challenge to an individual sale describes the "tiering" process. See *Headwaters, Inc. v. Bureau of Land Management*, Civil No. 89-6016, (amended opinion and order, May 23, 1989).

> the whole plan. It does have that effect. The plaintiffs argue, however, that the challenge of a number of particular sales is a challenge of "particular activities."

866 F.2d at 306. Similar arguments are made here. On this appeal plaintiffs claim support from the fact that they challenge less than 30 percent of planned timber sales; a challenge to 30 percent of one kind of "particular activity" authorized by the plans is not a challenge to the underlying plans, say plaintiffs. Looking at the same facts, the government argues that the relief demanded by plaintiffs is so broad that it would effectively vacate the BLM plans. The government points out that the injunctions plaintiff seeks would make it impossible for BLM to approach, much less meet, its annual allowable harvests under the plans. In attempting to define the statutory meaning by looking only at the relief this lawsuit demands, however, both plaintiffs and BLM go astray.

The answer to this quandary lies not in the scope of relief sought by plaintiffs, but in the underlying nature of plaintiffs' grievance. Plaintiffs challenge BLM's decision not to prepare a supplemental EIS in 1987. This was, they argue, a violation of NEPA. "NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA . . . [focuses] government and public attention on the environmental effects of proposed agency action. 42 U.S.C. § 4321." *Marsh v. Oregon Natural Resources Council*, 109 S.Ct. 1851, 1859 (1989). NEPA "insure[s] that . . . environmental amenities and values may be given appropriate consideration in decisionmaking" by requiring that an EIS be

prepared in every "recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. Plaintiffs' challenge does not make sense unless it is connected to some underlying federal action or substantive decision.

Here, if plaintiffs were to succeed on the merits of their NEPA claim, BLM would be required to suspend its management plans and prepare a supplemental EIS, addressing concerns about the northern spotted owl. A supplemental EIS cannot be entirely divorced from some underlying substantive federal decision: a decision either to continue with the action that followed preparation of the original EIS or to modify that action. In this case, a supplemental EIS would consider the possible land use alternatives of designating more or less old-growth forest for "intensive timber management" or reserving it for spotted owl habitat. A supplemental EIS would, plaintiffs hope, result in a BLM decision to modify its land use decisions. Those land use decisions, however, were made in the TMPs. The TMPs designate certain land for "intensive timber management." The decision to designate old-growth forest for "intensive timber management" was made with the knowledge that owl habitat would be sacrificed in the clear cuts and conversion to second-growth forest. That intentional trade-off of owls for economic gain was precisely the land use decision which is being challenged by plaintiffs.

We hold that section 314 precludes this kind of claim.

There is a presumption in favor of judicial review of administrative actions. *See Block v. Community Nutrition*

Inst., 467 U.S. 340, 350-51 (1984). It was that presumption which, in *PAS I*, required us to remand in order for the district court to apply the specific language of section 314 to plaintiffs' claims, to determine if, in fact, plaintiffs' claims rely solely on "new information" and whether they challenge the plans or "particular activities." The presumption in favor of review is overcome, however, where there is "persuasive reason to believe" that Congress intended to preclude judicial review, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), or a clear statutory command, *Moapa Band of Paiute Indians v. Dep't. of Interior*, 747 F.2d 563, 565 (9th Cir. 1984). Here, there exists not only persuasive evidence of congressional intent, but an explicit statutory command precluding review.

Plaintiffs have had ample opportunity to put forward an alternative interpretation of section 314 which would give meaning to the prohibition on challenges to the BLM plans. They present arguments, addressed above, explaining that the NEPA claim does not challenge the plans. They do not, however, provide any satisfactory explanation of what exactly would be a challenge to the plans under their interpretation of section 314. They present us no alternative interpretation that would allow us to give meaning to Congress' enactment, as is our duty, and yet would allow their NEPA claim to survive section 314. The district court correctly held that section 314 bars the NEPA claim.

Non-NEPA Claims

Plaintiffs also claim violations of the Oregon & California Lands Act, 43 U.S.C. § 1181, the Federal Lands Policy and Management Act, 43 U.S.C. §§ 1701 et seq., and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq. The district court granted summary judgment to BLM on each of these claims. These claims did not challenge the 1987 BLM decision not to prepare a supplemental EIS addressing the spotted owl. Instead, plaintiffs' complaint charges that BLM violated the OCLA and FLPMA by adopting a Forest Resources Policy Statement (FRPS) in 1983 requiring that all lands suitable for timber production be managed for the maximum timber production legally possible, and that destruction of old growth forest on BLM lands kills spotted owls, constituting a "taking" in violation of the MBTA.

In *PAS I*, we found that even if these claims could be construed as challenges to the plans, "fairly construed, the complaint does not rely solely on new information." 866 F.2d at 306. The OCLA and FLPMA claims challenge a BLM policy adopted prior to completion of many of the TMPs. The MBTA claim challenges the destruction of owl habitat planned in the TMPs. Indeed, as discussed in BLM's 1987 Spotted Owl Environmental Assessment, each TMP makes a region-wide decision, analyzed in the EIS, to trade owls for timber. The predicted destruction of owl habitat and resulting owl deaths are not new information. It was precisely this reasoning which allowed BLM to conclude that no supplemental EIS would be required.

The district court held that "the APA does not provide a basis for a challenge by [plaintiffs] to administrative decisions made over five years ago and upon which the BLM has operated without objection. . . . [Plaintiffs] failed to pursue [their] claims under OCLA, FLPMA, and the MBTA in a timely manner." *Portland Audubon Society v. Lujan*, 712 F. Supp. at 1484.

We have repeatedly cautioned against application of the equitable doctrine of laches to public interest environmental litigation.

> Laches must be invoked sparingly in environmental cases because ordinarily the plaintiff will not be the only victim of alleged environmental damage. A less grudging application of the doctrine might defeat Congress' environmental policy. Furthermore, citizens have a right to assume that federal officials will comply with applicable law and to rely on that assumption.

Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982)(citations omitted). This approach has found unanimous support in the other circuits.[6] The district

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[6] *Park County Resources Council v. United States Dep't of Agric.*, 817 F.2d 609, 617 (10th Cir. 1987); *Concerned Citizens on I-190 v. Secretary of Transp.*, 641 F.2d 1, 7-8 (1st Cir. 1981); *Save Our Wetlands, Inc. v. United States Army Corps of Eng'rs*, 549 F.2d 1021, 1026 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977); *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 977 (2d. Cir. 1976); *Minnesota Pub. Int. Res. Group v. Butz*, 498 F.2d 1314, 1324 (8th Cir. 1974); *Envtl. Defense Fund v. Tennessee Valley Auth.*, 468 F.2d 1164, 1182-83 (6th Cir. 1972); *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1329-30 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972).

court failed to confront these precedents, and the government fails to distinguish them. All of the concerns expressed in *Preservation Coalition* are present here. The old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce. The forests will be enjoyed not principally by plaintiffs and their members but by many generations of the public, as well as by owls.

When the district court has invoked laches, a reviewing court must determine whether the district court properly found (a) lack of diligence by the party against whom the defense is asserted, and (b) prejudice to the party asserting the defense. *Preservation Coalition*, 667 F.2d at 854; *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 779 (9th Cir. 1980). Here, the district court did not make a specific finding of prejudice or provide any explanation of how it considered the government to have been prejudiced. Other than noting that plaintiffs had not brought court challenges under the OCLA, FLPMA and MBTA until 1987, the district court did not indicate that plaintiffs had shown a lack of diligence.

The government argues that plaintiffs' claims should have been presented earlier, during the planning process that resulted in the TMPs. Plaintiffs respond that while the legal basis for their non-NEPA claims may have been available sooner, the motivation for this litigation came from the later revelation that the northern spotted owl may be endangered. Soon after receiving predictions of the owl's eventual demise in 1985 and 1986, they asked BLM to reexamine its planned destruction of owl habitat. Following BLM's refusal to prepare a supplemental EIS, they filed an administrative challenge, raising the same non-NEPA claims they now pursue.

An "indispensable element of lack of diligence is knowledge, or reason to know, of the legal right, assertion of which is 'delayed'." *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1977). As plaintiffs argue, the first case of which we are aware that acknowledges the right of citizens to enforce the MBTA through the Administrative Procedure Act was decided in 1987. *Alaska Fish & Wildlife Fed'n v. Dunkle*, 829 F.2d 933, 938 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1289 (1988). Plaintiffs cannot be said to have lacked diligence in not pursuing the MBTA claim earlier.

Even if plaintiffs had lacked diligence, however, the government has not demonstrated that it will suffer any prejudice if a court hears the merits of plaintiffs' non-NEPA claims. This is not a case where a dam or nuclear power plant has already been built, where a plaintiff has "sandbagged" a defendant by bringing a late challenge.

In this expedited appeal, we have not requested briefing on the merits of plaintiffs' non-NEPA claims. We express no opinion on the merits, on whether any other procedural defense may be available to defendants and intervenors, or whether these remaining claims would justify preliminary injunctive relief. We remand so that the district court can consider these matters in further proceedings.

We AFFIRM summary judgment in favor of the government on the NEPA claim and REVERSE and REMAND plaintiffs' non-NEPA claims. The injunction pending appeal is vacated on the date of the filing of this opinion.

No party to recover costs in this court.

COUNSEL

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Martin W. Matzen, Department of Justice, Washington, D.C., for defendant-appellee Manuel Lujan, Jr.

Phillip D. Chadsey, Stoel, Rives, Boley, Jones & Grey, Portland Oregon, for defendants-intervenors-appellees The Association of 0 & C Counties, et al.

Mark C. Rutzick, Preston, Thorgrimson, Ellis & Holman, Portland, Oregon, for defendants-intervenors-appellees The Northwest Forest Resource Council, et al.

APPENDIX B

PORTLAND AUDUBON SOCIETY; Headwaters; Lane County Audubon Society; Oregon Natural Resources Council; the Wilderness Society; Sierra Club; Siskiyou Audubon Society; Central Oregon Audubon Society; Salem Audubon Society; Kalmiopsis Audubon Society; Umpqua Valley Audubon Society; Natural Resources Defense Council, Inc., Plaintiffs-Appellees,

v.

Donald HODEL, in his official capacity as Secretary, United States Department of Interior, Defendant,

and

Northwest Forest Resources Council, Defendant-Intervenor-Appellant,

and

Huffman and Wright Logging Company; Freres Lumber Company, Inc.; Lone Rock Timber Company, Inc.; Scott Timber Company; Clear Lumber Manufacturing Corp.; Yoncalla Timber Products, Inc.; and Cornett Lumber Company, Inc., Defendants-Intervenors-Appellants.

PORTLAND AUDUBON SOCIETY; Headwaters; Lane County Audubon Society; Oregon Natural Resources Council; the Wilderness Society; Sierra Club; Siskiyou Audubon Society; Central Oregon Audubon

Society; Salem Audubon Society; Kalmiopsis Audubon Society; Umpqua Valley Audubon Society; Natural Resources Defenses Council, Inc., Plaintiffs-Appellants,

v.

Donald HODEL, in his official capacity as Secretary, United States Department of Interior, Defendant-Appellee,

and

Northwest Forest Resources Council; Association of O & C Counties; Benton County, Defendants-Intervenors-Appellees.

Nos. 88-3854, 88-3855 and 88-3787.

United States Court of Appeals
Ninth Circuit.

Argued and Submitted July 19, 1988.
Decided Jan. 24, 1989.

Victor M. Sierra Club Legal Defense Fund, Inc., Seattle, Wash., Michael Axline, Western Natural Resources Law Clinic, Eugene, Or., for plaintiffs-appellants-cross-appellees.

Martin W. Matzen, Dept. of Justice, Wash., D.C., and Thomas C. Lee, Asst. U.S. Atty., Portland, Or., for defendant-appellee.

Mark C. Rutzick, Preston, Thorgrimson, Ellis & Holman, Portland, Or., for defendants-intervenors-appellees-cross-appellants.

Phillip D. Chadsey, Stoel, Rives, Boley, Jones & Grey, Portland, Or., for defendants-intervenors-appellees.

Appeal from the United States District Court for the District of Oregon.

Before GOODWIN, Chief Judge, SCHROEDER and PREGERSON, Circuit Judges.

GOODWIN, Chief Judge:

Plaintiff environmental groups appeal the dismissal under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) of their action against defendant Donald Hodel, Secretary of Interior, and others. Certain intervenors also challenge the district court's denial of their motion to intervene on one of the plaintiff's claims. We reverse in part and remand for trial.

The plaintiffs oppose the logging of old-growth fir timber. The Oregon director of the Bureau of Land Management (BLM) is in the process of selling for harvesting a large number of tracts of old-growth timber located in seven management districts. Plaintiffs sued to prevent logging these timber sales. Their main argument is that logging will destroy the habitat of the northern spotted owl, thereby threatening the species with extinction. For the purposes of Rule 12 review, we are required to assume the truth of the alleged facts.

The complaint sought declaratory and injunctive relief based upon the logging plan's alleged violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (1982), the Oregon and California Lands Act,

43 U.S.C. § 1181 (1982), the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782 (1982), and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-12 (1982).

Plaintiffs do not seek relief under the Endangered Species Act because the United States Fish and Wildlife Service has refused to declare the Northern Spotted Owl an endangered species. This refusal has been challenged in other litigations by some of the same plaintiffs. *See Northern Spotted Owl (Strix Occidentalis Caurina) v. Donald Hodel,* (W.D. Wash. No. C88-573Z, November 17, 1988) [1988 WL 149253].

Plaintiffs seek an injunction to halt all timber sales that included old-growth Douglas fir trees more than 200 years old and growing within 2.1 miles of known spotted owl habitat sites. Maps of proposed timber sales reveal that some 289 of the old-growth fir timber stands offered for sale fall within the requested injunction.

The Northwest Forest Resources Council (NFRC), eight Oregon counties, and various individual contractors (the Huffman & Wright Group) were allowed to intervene as defendants with respect to certain of the plaintiffs' claims.

While this appeal has been pending, we granted in part the plaintiffs' emergency motion for a temporary injunction. During the summer of 1988, selected logging operations were allowed to continue, but the logging of several other sales was enjoined. The question that remains to be decided is whether plaintiffs can continue this litigation.

Statutory Withdrawal of Jurisdiction

The district court held that section 314 of the 1988 continuing budget resolution withdrew the court's jurisdiction to consider the plaintiff's claim.

Section 314 provides:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however,* That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further,* That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

Continuing Resolution, H.J.Res. 395, § 314, Pub.L. No. 100-202, 101 Stat. 1329-254, 133 Cong.Rec. H 12468 (daily ed. Dec. 21, 1987) (emphasis added). (The above section was reenacted without change as H.R. 4867 and signed by the President on September 27, 1988, and is now found in Pub.L. No. 100-446).

The plaintiffs argue that the quoted section of the continuing resolution does not withdraw jurisdiction to hear this case. The section purports in one sentence to take away the jurisdiction of the district courts to hear challenges to "existing plans", while in a following sentence providing "further that any and all particular activities to be carried out under existing plans may nevertheless be challenged." The trial court interpreted this extraordinary language as a clear withdrawal of jurisdiction. We find it anything but clear.

Plaintiffs argue in effect that each sale which includes spotted owl habitat is a "particular activity" subject to challenge. Defendants argue, on the other hand, that each of the seven regional "existing plans" is a comprehensive and carefully coordinated management plan of scheduled sales preceded in each of the seven districts by environmental impact statements, and, by express legislative intent, made immune from challenge.

The management plans are designed to provide a steady flow of old growth timber from the federal inventory to the sawmills and other manufacturers in the Oregon counties containing BLM old growth timber. Defendants argue that the challenge of virtually all of the planned soles under the guise of challenging "particular activities" is a transparent effort to avoid the clear intent of section 314 by nibbling away at the management plans, sale by sale.

The sales are indeed separate transactions. They are also part of an existing plan of disposal of federal timber in the region. Thereby hangs the problem in this case.

"We begin with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 2135, 90 L.Ed.2d 623 (1986); *see Love v. Thomas*, 858 F.2d 1347 (9th Cir.1988) (observing that "we construe prohibitions against judicial review narrowly"). *See Moapa Band of Paiute Indians v. United States Dep't of Interior*, 747 F.2d 563, 565 (9th Cir.1984) (observing that "[p]reclusion of judicial review . . . usually will not be found absent a clear command of the statute").

The language in section 314 upon which the district court relied is "that there shall be no challenges to any existing plan . . . solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan. . . ." Here the key words seem to be "solely" and "information available subsequent to the completion of the existing plan."

The plan to sell substantially all the marketable old growth fir timber remaining under BLM management was an "existing plan" when this litigation was commenced. The environmental implications of the plan had been fully studied between 1979 and 1983. The studies had evaluated the impact upon wildlife, including owls. It was and is no secret that the northern spotted owl disappears when its habitat is destroyed by logging. The plan was nonetheless approved and was being executed. This litigation threatened to delay the proposed sales, at considerable expense to the impacted counties, industrial purchasers, and the communities that rely upon the timber industry for their livelihood.

The defendants went to their senators and representatives, and section 314 was a result. The environmental impact studies made in 1983 during the preparation of the plan had not been challenged in court. They had been challenged in administrative proceedings. After the sales were advertised in 1987, the plaintiffs discovered more information about the northern spotted owl. Bird experts generally agreed that the continued logging of old growth fir would probably exterminate the species in the logged off areas. The owl habitat problem had been treated in the impact statements, but had not been deemed by the BLM to be a sufficient reason to abort the plan. New information generated both inside and outside the federal government reinforced the plaintiffs' opposition to the timber sales, but did not cause the BLM to change its position.

There is little doubt about the intent of the sponsors of section 314. The sponsors intended to stop this particular lawsuit and to permit the sales to go forward without further delay. It is equally clear that the plaintiffs intended to stop the logging, by any legal means available. Actual "legislative" intent of congressional sponsors is not seriously debated in this case.

The legal problem that the court faces is to determine whether, following principled methods of statutory construction, Congress expressed the intent of the section's sponsors in such a way as to withdraw the jurisdiction of the district court to try this lawsuit.

The district court characterized this action as an action brought "on the sole basis of new information concerning the northern spotted owl." The plaintiffs

argue that the district court erred in characterizing a "sole basis" because the court did not take account of a number of other theories relied upon by the plaintiffs.

Plaintiffs allege that new information shows a violation of the Migratory Bird Treaty Act. The district court did not refer to this statute in holding that plaintiffs' claim is based upon "information available subsequent to the completion of the existing plan. That holding solves only part of the problem.

For example, plaintiffs contend that the logging will constitute a taking of habitat and thus a taking of protected birds under the Act. Plaintiffs say that this migratory bird claim does not depend upon "new information." We express no opinion on the merits of this argument. The district court had not yet considered it. But a claim somewhat similarly framed was recently recognized as at least reviewable in *Palila v. Hawaii Dept. of Land*, 852 F.2d 1106 (9th Cir.1988) (finch-billed Palila habitat harmed by grazing sheep.)

The plaintiffs also challenge the Secretary's interpretation of the Oregon and California Lands Act (OCLA). Because they challenge decisions about owl habitat made before the plans at issue were adopted, that part of the claim does not appear to be based on new information, and therefore, whatever its merits, is not subject to Rule 12(b) dismissal on its face as being based on new information.

Contrary to the district court's conclusion, the plaintiffs' complaint does not allege "that the plan in its entirety is outdated" and "solely . . . that the plan does not incorporate information available subsequent to the

completion of the existing plan." Section 314. Instead, the plaintiffs seek, on a variety of grounds, to enjoin specific timber sales that have been authorized pursuant to the plans. It is true that the complaint relies on information published after the "existing plan" was completed. However, fairly construed, the complaint does not rely solely upon new information.

The plaintiffs contend that the controlling language of section 314 is that "[n]othing shall limit judicial review of particular activities on these lands" and that "any and all particular activities to be carried out under existing plans may . . . be challenged." *Id.* The district court has not yet passed upon the question whether timber sales are "particular activities".

The defendants argue that because the plaintiffs seek to enjoin every planned sale that includes old-growth timber within a 2.1-mile radius of an owl habitat, the attack is essentially an attack on the whole plan. It does have that effect. The plaintiffs argue, however, that the challenge of a number of particular sales is a challenge of "particular activities," the right to which is guaranteed by the express terms of the statute. With this set of competing views of the language of the statute as applied to the more or less undisputed facts, the district court opted to end the case by the first door out – resort to the "sole basis" clause. It is not that easy.

Legislative History

The defendants point to fragments of the legislative history of section 314 that indicate that Congress intended to preclude judicial review in this very case. *See*

Block v. Community Nutrition Institute, 467 U.S. 340, 345, 104 S.Ct. 2450, 2453-2454, 81 L.Ed.2d 270 (1984) (stating that "[w]hether and to what extend a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved"). Parts of the legislative history, such as comments by individual sponsors and committee reports, support the defendants' claim.

There is no doubt that the BLM has been instructed to sell, and that the logging industry desires to buy, as much old growth fir timber as can be reached by existing technology. The record contains abundant evidence of local Congressional support for the marketing plan. However, expressions of individual legislators' intent do not necessarily prove congressional intent. See *TVA v. Hill*, 437 U.S. 153, 189-191, 98 S.Ct. 2279, 2299-2300, 57 L.Ed.2d 117 (1978). Substantial doubt about the congressional intent exists.

The district court opinion quoted from and relied on the Senate committee report. We have examined that report, and also the conference report.

The conference committee report explains changes to the Senate report and says the statute means that "existing plans may not be challenged solely on the basis that the plans are outdated or that there is new information, *unless the claim includes information as to substantive concerns related to the new information. Any particular activities, such as individual timber sales, may continue to be challenged as always.*" Conference Report No. 498, 100th Cong., 1st

Sess. at 925 (emphasis added). This language tends to support the plaintiffs.

The plaintiffs assert that their newly discovered information about the loss of habitat and the resulting loss of bird population is a substantive concern. The district court has only indirectly passed upon this question. The plaintiffs also argue that they are not challenging the marketing plan solely on the basis of the alleged obsolescence of the 1983 environmental studies nor solely on the acquisition of new information, but on the additional ground that the plan violates a number of other specific statutory provisions. When looking at the complaint as a whole it is difficult to avoid the conclusion that it challenges particular sales (activities) on grounds that remain available under the express terms of the very statute upon which the defendants rely. Accordingly, we must hold that the Section 314 savings clauses require the district court to decide how to apply the law to particular sales.

Express or Implied Repeal

Section 314 precludes resort to the judicial review provisions of the Administrative Procedure Act for challenges to the existing plan solely on the basis that the plan does not incorporate new information. The only way to find further elements of plaintiffs' claims precluded would be if section 314 had repealed the relevant statutes as they apply to the entire subject of the litigation.

Plaintiffs characterize defendants as arguing, in effect, that section 314 brought about either the express or implied repeal of the judicial review provisions of the

Administrative Procedure Act as applied to the Oregon BLM timber sales plans. Section 314 does not use the word "repeal" and mentions no other statutes. Obviously there can be no express repeal without reference to the "repealed" statute. *Sutherland Stat. Const.* § 23.07 (4th ed).

If the defendants were to fall back to an argument that there is an implied repeal of NEPA, the Migratory Bird Act, and other statutes as they may pertain to judicial review of timber sales under the challenged plans, the implied repeal argument would run afoul of *TVA v. Hill, supra.* That case squarely rejected a contention that a continuing appropriation for a dam constituted an implied repeal of the Endangered Species Act as it related to construction of the Tellico Dam. Nothing in Section 314 implies the repeal of any law.

In attempting to distinguish *TVA v. Hill* and the entire question of implied repeal, the defendants claim that in *TVA v. Hill,* unlike our case, no statutory language whatsoever exempted the dam project from the requirements of the Endangered Species Act; only legislative history called for such exemption. Defendants also assert that the Supreme Court's opinion leaves no room for doubt that the Court would have sustained the exemption *if* the exemption could have been found in the words of the statute. 437 U.S. at 189-191, 195, 98 S.Ct. at 2299-2300, 2302. That may be true. But the statute before us contains no words that exempt timber sales from challenge. The statute merely precludes judicial review when the only basis upon which the plaintiffs seek review is that the plan did not incorporate newly discovered information (about owls) not available to the BLM when the plan was adopted.

At a trial, both sides may be able to show that owl habitat degradation was known before or after the plan was adopted. Such proof would shed light on the "new information" problem. However, that would not answer the last "provided however" clause of the section. That clause forces the decision maker to decide whether the challenge is to the plan or to particular activities. That decision must be made in the first instance by the trial court.

Plaintiffs' Motion

The plaintiffs have asked us to consider the merits of their motion for summary judgment. The district court has not yet had the opportunity to consider the motion, and we decline to conduct an independent search of documents and reports to rule on a summary judgment motion.

We vacate the temporary injunction that was granted pending appeal, without prejudice to the plaintiffs' effort to obtain site specific injunctive relief from the district court if plaintiffs can establish a likelihood of success on the merits of their challenges of particular sales. We express no opinion upon the ultimate right to injunctive relief.

Cross Appeal

On cross-appeal, NFRC and the Huffman & Wright Group (intervenors) argue that the district court erred in refusing to permit them to intervene as defendants as to the plaintiffs' NEPA claim. The district court found that

the intervenors were not entitled to intervention of right on the NEPA claim because they lacked "an interest relating to the property or transaction which is the subject of the action," as required by Fed.R.Civ.P. 24(a)(2). On appeal, the plaintiffs do not challenge the district court's decision to allow intervention as to the other claims.

In our circuit,

> [a]n order granting intervention as of right is appropriate if (1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; end (4) the applicant's interest is not adequately represented by the existing parties.

County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir.1986) (quoting U.S. v. Stringfellow, 783 F.2d 821 at 826), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987).

The only remaining question is whether the intervenors have satisfied the second prong of the intervention test, the "interest" requirement, because no one denies that they have an economic interest in ensuring a continued supply of timber from BLM lands.[1]

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[1] The plaintiffs urge us to find that a party seeking to intervene must have standing, as the D.C. Circuit has held. *See Cook v. Boorstein*, 763 F.2d 1462, 1470-71 (D.C.Cir.1985). However, we in the past have resolved intervention questions without making reference to standing doctrine. *See, e.g., Sagebrush*

(Continued on following page)

> We have rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest. . . . We agree with the D.C. Circuit that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and the due process.' " . . . The "interest test" is basically a threshold one, rather than the determinative criterion for intervention, because the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task of limiting extension of the right to intervene.

County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir.1980) (citations omitted).

The district court relied upon the analysis of *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir.1982) (per curiam), in holding that the intervenors could not intervene as to the plaintiffs' NEPA claim.

(Continued from previous page)

Rebellion, Inc. v. Watt, 713 F.2d 525, 527-29 (9th Cir.1983). The Supreme Court recently declined to decide "whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68-69 & n. 21, 106 S.Ct. 1697, 1706-1707, n. 21, 90 L.Ed.2d 48 (1986) (observing that "[t]he Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing"). Without an en banc review, we must follow the *Sagebrush Rebellion* analysis and decline to incorporate an independent standing inquiry into our circuit's intervention test. However, the standing requirement that at least implicitly addressed by our requirement that the applicant must "assert[] an interest relating to the property to transaction which is the subject of the action." *County of Orange*, 799 F.2d at 537 (quoting *Stringfellow*, 783 F.2d at 826).

In *Wade*, the Seventh Circuit rejected the attempt of a corporation, four families, and assorted city and county governments to intervene as defendants where the plaintiffs had challenged a proposed bridge and expressway project as violate of several federal statutes, including NEPA, *See id.* 184-85. The *Wade* court found that the proposed intervenors did not posses the "direct, significant legally protectable interest in the property or transaction" required for intervention under Fed.R.Civ.P. 24(a)(2). *Id.* at 185.

> The only interest involved is of the named defendants, governmental bodies. . . .[T]he only focus that the ongoing litigation . . . can have is whether the governmental bodies charged with compliance, defendants, have satisfied the federal statutory procedural requirements in making the administrative decisions regarding the construction which would directly affect plaintiffs' property. In a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants. As to the determination involved in this suit, all other entities have no right to intervene as defendants.

Id.

The intervenors argue that we should not follow *Wade* because it was based upon an unduly restrictive view of the "interest" test. However, the footnote relied upon by the intervenors suggests that the "interest" test will not be satisfied where a holding "will not affect a statute or regulation governing the applicants' actions, nor will it directly alter contractual or other legally protectable rights of the proposed intervenors." *Id.* at 189 n.

6. This accords with our circuit doctrine that Fed.R.Civ.P. 24(a)(2) requires no "specific legal or equitable interest," *County of Fresno*, 622 F.2d at 438, as modified by the Supreme Court's statement that the rule does require a "significantly protectable interest," *Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971).

We reject the intervenors' argument that *Wade* is inconsistent with two of our cases. In *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir.1983), we found that the intervenor environmental groups, which had asserted "environmental, conservation and wildlife interests," had an adequate interest in the litigation to intervene on behalf of the defendant government officials where the plaintiffs had challenged the government's attempted to create a bird preserve. In *County of Fresno*, 622.F.2d at 437-38, we found that an organization of small farmers could intervene as defendants against a chalienge to federal reclamation laws because the organization's members were "precisely those Congress intended to protect with the reclamation acts and precisely those who will be injured." The intervenors' claim here, unlike those make in *Sagebrush Rebellion* and *County of Fresno*, has no relation to the interests intended to be protected by the statute at issue - in this case, NEPA. Hence, *Wade* does not conflict with our circuit's precedents.

The district court correctly followed *Wade* in holding that the intervenors lack an adequate interest relating to the plaintiffs' NEPA claims where NEPA provides no protection for the purely economic interests that they assert. Although the intervenors have a significant economic stake in the outcome of the plaintiffs' case, they

have pointed to no "protectable" interest justifying intervention as of right. *Donaldson*, 400 U.S. at 531, 91 S.Ct. at 542. We therefore affirm the district court's denial of the intervenors' motion to intervene as of right on the plaintiffs' NEPA claims. Upon remand, the intervenors are of course free to request the district court's permission to submit amicus briefing on the NEPA claims.

We reverse the judgment dismissing the action and remand for further proceedings. We vacate the stay pending appeal, without prejudice to any appropriate renewed efforts by the plaintiffs to obtain such temporary remedies, if any, as the district court may deem necessary and proper. We affirm the district court's denial of the motion by NFRC and the Huffman & Wright Group to intervene as defendants on the plaintiffs' NEPA claims.

REVERSED IN PART, AFFIRMED IN PART, and REMANDED.

NO PARTY TO RECOVER COSTS.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUDUBON SOCIETY, CENTRAL OREGON AUDUBON SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL,

Plaintiffs,

v.

MANUEL LUJAN, JR. in his official capacity as Secretary, United States Department of Interior,

Defendant,

and

Civil No. 87-1160-Fr

ORDER

(Filed May 18, 1989)

NORTHWEST FOREST RESOURCE)
COUNCIL, HUFFMAN & WRIGHT)
LOGGING CO., FRERES LUMBER)
CO., INC., LONE ROCK TIMBER)
CO., INC., SCOTT TIMBER CO.,)
CLEAR LUMBER)
MANUFACTURING)
CORP., YONCALLA TIMBER)
PRODUCTS, INC., CORNETT)
LUMBER COMPANY, INC., THE)
ASSOCIATION OF O & C)
COUNTRIES and BENTON)
COUNTY, DOUGLAS COUNTY,)
INC., dba DOUGLAS COUNTY)
FOREST PRODUCTS COMPANY,)
MEDFORD CORPORATION, and)
ROGGE FOREST PRODUCTS, INC.,)
)
Defendants-Intervenors.)

IT IS HEREBY ORDERED and plaintiffs' renewed motion for summary judgment (#149) is DENIED, the defendant's motion for summary judgment (#161) is GRANTED.

DATED this 18 day on May, 1989.

/s/ Helen J. Frye
United States District
Judge

PORTLAND AUDUBON SOCIETY, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, the Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley

Audubon Society, Natural Resources Defense Council, Plaintiffs,

v.

Manual LUJAN, JR., in his official capacity as Secretary, United States Department of Interior, Defendant,

and

Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., the Association of O & C Counties and Benton County, Douglas County, Inc., dba Douglas County Forest Products Company, Medford Corporation, and Rogge Forest Products, Inc., Defendants-Intervenors.

Civ. NO. 87-1160-FR.

United States District Court,

D. Oregon.

May 18, 1989.

Victor M. Sher, Todd D. True, Sierra Club Legal Defense Fund, Seattle, Wash., for Plaintiffs Portland Audubon Soc., Headwaters, The Wilderness Soc., Sierra Club, Inc., Siskiyou Audubon Soc., Cent. Oregon Audubon Soc., Kalmiopis Audubon Soc., Umpqua Valley Audubon Soc., and Nat. Resources Defense Council.

Michael D. Axline, John E. Bonine, Western Nat. Resources Law Clinic, University of Oregon School of

Law, Eugene, Or., for plaintiffs Lane County Audubon Soc. and Oregon Nat. Resources Council.

Charles H. Turner, U.S. Atty., Thomas C. Lee, Asst. U.S. Atty., Portland, Or., Roger W. Nesbit, Sp. Asst. U.S. Atty., Portland, Or., for defendant Manuel Lujan, Jr.

Mark C. Rutzik, Robert D. Nesler, Preston, Thorgrimson, Ellis & Holman, Portland, Or., for defendants-intervenors, Northwest Forest Resources Council, Huffman & Wright Logging Co., Freres Limber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Mfg. Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., Douglas County, Inc., dba Douglas County Forest Products Co., Medford Corp., and Rogge Forest Products, Inc.

Phillip D. Chadsey, Stoel, Rives, Boley, Jones & Grey, Portland, Or., for defendants-intervenors, The Ass'n of O & C Counties and Benton County.

OPINION

FRYE, Judge:

The matters before the court are the cross-motions for summary judgment filed by the plaintiffs (#149) and the defendant, Manuel Lujan, Jr., in his official capacity as Secretary, United States Department of Interior, hereinafter referred to as Bureau of Land Management (BLM) (#161).

INTRODUCTION

Plaintiffs, Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural

Resources Council, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council (hereinafter referred to as Portland Audubon Society), are environmental groups seeking to protect the habitat of the northern spotted owl in the States of Oregon and Washington.

The natural habitat of the spotted owl is old-growth timber.

Manual Lujan, in his capacity as Secretary of the United States Department of the Interior, heads the BLM which manages 2,386,500 acres of federal lands in five districts in western Oregon. The director of the BLM for the State of Oregon is in the process of selling for harvesting tracts of old-growth timber located in seven management districts within the State of Oregon.

The Northwest Forest Resources Council, eight counties within the State of Oregon, and various individual contractors were allowed to intervene.

The Portland Audubon Society filed this action seeking declaratory and injunctive relief. It asks the court to declare that the BLM's sales of old-growth timber in natural spotted owl habitat without examining, *inter alia*, new information on the spotted owl in a supplemental EIS violates the National Environmental Policy Act, 42 U.S.C § 4321 *et seq.* (NEPA), and 40 C.F.R. § 1502.9(c); that defendant's Forest Resources Policy Statement is contrary to the Oregon and California Lands Act and the Federal Lands Act and the Federal Lands Policy and Management Act; that defendant's sales of old-growth timber which

result in the death of spotted owls violate the Migratory Bird Treaty Act; the defendant's actions are not in accordance with law, contrary to 5 U.S.C. § 706(2)(A); and that defendant's actions are not in compliance with the procedures required by law, contrary to 5 U.S.C. § 706(2)(D). The Portland Audubon Society asks the court to enjoin the BLM from offering the old-growth sales and from offering any additional old-growth sales within a 2.1 mile radius of known habitat sites of the spotted owl until the BLM complies with the law. The Portland Audubon Society also seeks an award of reasonable attorney fees and costs.

After a hearing, the court entered a preliminary injunction pending the resolution of these motions for summary judgment.

FACTS

During the late 1970's and early 1980's, the BLM conducted an intensive planning effort for its districts in western Oregon. As part of that planning effort, each district prepared one or more Environmental Impact Statement(s) pursuant to NEPA, 42 U.S.C. § 4332. From 1978 through 1983, an Environmental Impact Statement was prepared pursuant to the Timber Management Plan for each of the following districts:

Josephine:	October, 1978
Jackson-Klamath:	November, 1979
South Coast Curry:	May, 1981
Westside Salem:	January, 1982
Eastside Salem:	May, 1983
Eugene:	May, 1983
Roseburg:	May, 1983

Each Environmental Impact Statement contains an evaluation of the environmental impact that is predicted from the implementation of each Timber Management Plan. Each Environmental Impact Statement sets an annual allowable timber harvest for the district or sub-district expressed in terms of millions of cubic and board feet. The annual allowable timber harvest for each district or sub-district was determined by the constraints identified in each proposed decision. Alternatives in each Environmental Impact Statement were developed to emphasize one or several management values. For example, the five management values emphasized in the Jackson-Klamath Final Timber Management Environmental Statement were:

1. No control of Competing Vegetation;
2. Limited Investment of Timber Production;
3. Utilization of Surplus Inventory;
4. Forestry Program for the State of Oregon; and
5. No Action.

The Jackson-Klamath Final Timber Management Environmental Statement, which includes hundreds of pages, contains, among others, the following chapters:

1. Description of the Proposed Action;
2. Description of the Environment;
3. Impacts of the Proposed Action;
4. Mitigating Measures not Included in the Proposed Action;
5. Adverse Impacts that Cannot be Avoided;

6. The Relationship Between Local Short-Term Uses of Man's Environment and Long-Term Enhancement of Productivity;

7. Irreversible and Irretrievable Commitment;

8. Alternatives; and

9. Consultation and Coordination.

In chapter 2, under the "Description of the Environment," the Jackson-Klamath Final Timber Management Environmental Statement contains the statement that the spotted owl, listed by the State of Oregon as a threatened species, is a permanent resident of the planning area. The Jackson-Klamath Final Timber Management Environmental Statement also indicates known nests of spotted owl in a map of the area. As to "Impacts of the Proposed Action," the Jackson-Klamath Final Timber Management Environmental Statement notes as follows:

> The northern spotted owl is dependent on old-growth, closed canopy forests. Pursuant to the Oregon Endangered Species Task Force recommendations, a joint agreement with the State of Oregon, U.S. Forest Service and the U.S. Fish and Wildlife Service was signed, and BLM has agreed to protect 14 pairs of owls in the Medford District. Eight of these have been assigned to the JKSYUs [Jackson and Klamath Sustained Yield Units]. The management plan calls for total protection of 300 acres of old-growth core area (if available) and an additional 900 acres to be managed to provide at least 50 percent of the acreage in stands of 30 + year-old forests. The eight pairs receiving protection may change occasionally as new pairs are located or new timber replacement stands become available.

> Additional northern spotted owls in excess of the eight pairs may have their habitat reduced or eliminated if it is in a sale area. The results of this action are unknown. However, if it is assumed that all lands are at carrying capacity, then it is likely these owls would be eliminated. Two nest trees are within the boundaries of Sales 81-21 and 82-18. Five nest trees in Sales 80-22, 80-23, 81-4 and 82-20 are within one-third mile of areas scheduled for shelterwood harvest in the first 3 years. It is possible that the owls occupying these nest trees would be eliminated due to removal of their habitat.

Jackson-Klamath Final Timber Management Environmental Statement, p. 3-41.

The report concludes:

> Seven known nest trees are within one-third mile of proposed sale areas and individual spotted owls may be adversely impacted by clearcutting, shelterwood harvest and overstory removal. By following recommendations of the interagency management committee, the species as a whole would be only moderately affected.

Id.

In the final Record of Decision, Alternative 3b was chosen for implementation. The Jackson-Klamath Final Timber Management Environmental Statement describes the effect of Alternative 3b on the spotted owl as follows:

> About 35 percent of the old growth currently existing on the high intensity lands of the JKSYUs would be harvested during the first decade. This could mean a 35 percent reduction of old-growth dependent species such as the northern spotted owl, redback vole and pileated

> woodpecker on these lands. Old growth would be eliminated on the high intensity lands of the JKSYUs by the year 2018 if the alternative were implemented.

Id. at 8-24.

The seven Environmental Impact Statements prepared for each of the seven districts provided the bases for adoption by the BLM of a Management Framework Plan and a Timber Management Plan for each district or sub-district. The Timber Management Plans were adopted and approved by the state director of the BLM in Records of Decision dating from 1979 through 1983. Each Record of Decision describes the nature of the Timber Management Plan that was adopted in terms of the annual allowable harvest and in terms of allocation of acreages to different types of forest.

The timber resources of the BLM in western Oregon are currently managed under these seven Timber Management Plans. Timber sales which the BLM undertakes in the seven districts of western Oregon are evaluated with reference to the applicable Environmental Impact Statement. Environmental Assessments are prepared to analyze proposed timber sales. Each Environmental Assessment is "tiered" to the pertinent Environmental Impact Statement for each Timber Management Plan.

The Timber Management Plans adopted by the BLM from 1979 through 1983 were intended to remain in effect for periods of ten years. In 1986, the Oregon director of the BLM decided to replace these plans with coordinated and simultaneous plans that would govern management of all of the resources on BLM lands in western Oregon.

Preparation of new Resource Management Plans was announced by the State director in a brochure dated May 30, 1986. This process is continuing and is expected to produce new Environmental Impact Statements and new Timber Management Plans by the end of the decade.

On September 26, 1983, the BLM and the Oregon Department of Fish and Wildlife (ODFW) entered into an agreement entitled "BLM-ODFW AGREEMENT For Spotted Owl Habitat Management on BLM Lands in Western Oregon," which provides in part as follows:

> 2. The parties agree that BLM will, for the next five years, manage the habitat to maintain a population of 90 pairs of spotted owls, with appropriate distribution of pairs, as a contribution to maintaining a minimum viable population in western Oregon. The parties will work cooperatively in developing habitat management plans for each of the western Oregon BLM districts to carry out the intent of the agreement. The parties will work cooperatively in allocating habitat-protected pairs between districts. Annual timber harvest plans will be reviewed by the parties to assure that the intent of this agreement is maintained.
>
> 3. No later than October 1, 1988 the parties will review any new scientific information and current conditions of spotted owl pairs and habitat to determine at that time what actions are necessary for the protection of spotted owls. This agreement shall become effective when signed by the parties hereto and shall continue in force until termination by either party upon thirty days notice in writing to the other of its intention to terminate upon a date indicated.

The BLM has continued to collect data concerning the spotted owl throughout the early 1980's and to the present. These efforts include the inventory of spotted owls, the monitoring of spotted owls, the mapping of spotted owl habitat, and research aimed at evaluating the habitat requirements of the spotted owl.

In response to requests by environmental groups, including the Portland Audubon Society, to prepare Supplemental Environmental Impact Statements on the spotted owl, the BLM decided to prepare an Environmental Assessment to allow it to determine whether the Environmental Impact Statements prepared for the Timber Management Plans should be supplemented. The state director of the BLM issued a memorandum on November 7, 1986 to district managers providing for interim protection of spotted owls pending the completion of the Environmental Assessment. The Environmental Assessment was completed and published on February 3, 1987. The conclusion of the BLM in the Environmental Assessment was that the new information about the spotted owl, which the Portland Audubon Society had provided as a basis for supplementing the Environmental Impact Statements, was too preliminary in nature to support a decision. The Environmental Assessment included a review of the anticipated impacts from implementation of the timber sales that were planned through 1990. The conclusion in the Environmental Assessment was that new information about the spotted owl that had been acquired since the adoption of the Timber Management Plans would not cause the impacts to the spotted owl of the planned timber sales to be worse than originally predicted in the

Environmental Impact Statements for each Timber Management Plan. The state director of the BLM reviewed the Environmental Assessment and decided on April 10, 1987 not to supplement any of the seven Timber Management Plans or Environmental Impact Statements. In his Decision Record, the state director of the BLM states:

> In summary, for five of the seven EIS areas, the EA concluded that more owl habitat sites would remain by October 1990 than was predicted to remain if the current plan continued in effect, under the most pessimistic conclusion reached in BLM analysis at the time the current plan decisions were made. For the other two EIS areas (Westside Salem and Eugene), the EA concluded that less owl habitat sites may remain today than were predicted to remain in the previous EISs, but that timber sales planned from now through FY 1990 would not reduce these lower numbers further.

Decision Record, p. 2.

The Portland Audubon Society filed an administrative appeal to the Interior Board of Land Appeals from the state director's decision requesting immediate stays of all sales by the BLM of timber older than 200 years within a 2.1 mile radius of 289 spotted owl habitat sites. Portland Audubon Society's statement included the statement that it would regard no response to its request within thirty days as a denial of the request and an exhaustion of its administrative remedies.

On July 1, 1987, the Interior Board of Land Appeals denied the request for a stay for failure by the Portland Aubudon Society to identify the timber sales it wished to

have stayed. On September 4, 1987, the Portland Audubon Society renewed its request for a stay, filing an affidavit identifying the timber sales it wished to have stayed. In this application, the Portland Audubon Society stated that it would view a failure to act on this renewed request within twenty days as a denial of its request.

The Interior Board of Land Appeals issued an order on October 13, 1987 allowing intervention in the administrative appeal by the Northwest Forest Resources Council and the Association of O & C Counties and denying motions to dismiss the appeal. The Interior Board of Land Appeals did not rule on the Portland Audubon Society's motion to stay or the motion of the Association of O & C Counties for an extension of time to file a brief in response to the Portland Audubon Society's renewed request for a stay.

On October 19, 1987, the Portland Audubon Society filed this action alleging that the decision not to prepare a supplemental Environmental Impact Statement is in violation of NEPA, the Oregon & California Lands Act (OCLA), 43 U.S.C. § 1181, the Federal Lands Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701, *et seq.*, the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703 *et seq.*, and the Administrative Procedures Act (APA), 5 U.S.C. §§ 553 *et seq.* On October 27, 1987, the Interior Board of Land Appeals issued an order granting an extension of time to the Northwest Forest Resources Council and the Association of O & C Counties to file a response to the renewed request of the Portland Audubon Society for a stay until November 13, 1987. The BLM and the Northwest Forest Resources Council filed responses on that day, and the BLM also filed a request

for reconsideration of the order of October 13, 1987, in which its motion to transfer the appeal for decision under the planning regulations was denied. On February 28, 1988, the Interior Board of Land Appeals issued a decision upholding the BLM's decision not to supplement the Environmental Impact Statement.

On April 20, 1988, the court entered judgment for the BLM having concluded that section 314 of the continuing budget resolution withdrew the court's jurisdiction to consider the Portland Audubon Society's claims. The Portland Audubon Society sought and obtained an injunction from the Ninth Circuit on May 18, 1988.

On January 24, 1989, the Ninth Circuit Court of Appeals reversed this court's judgment of dismissal and remanded the action for further proceedings. The Ninth Circuit concluded that this court had improperly dismissed the action pursuant to Fed.R.Civ.P. 12(b)(1) under Section 314 based upon the allegations of the complaint. The Ninth Circuit stated:

> When looking at the complaint as a whole it is difficult to avoid the conclusion that it challenges particular sales (activities) on grounds that remain available under the express terms of the very statute upon which the defendants rely. Accordingly, we must hold that the Section 314 savings clauses require the district court to decide how to apply the law to particular sales.
>
> . . . .

> At a trial, both sides may be able to show that owl habitat degradation was known before or after the plan was adopted. Such proof would shed light on the "new information" problem. However, that would not answer the last "provided however" clause of the section. That clause forces the decision maker to decide whether the challenge is to the plan or to particular activities. That decision must be made in the first instance by the trial court.

Poland Audubon Society v. Hodel, 866 F.2d 302 at 307-08 (9th Cir.1989).

The Portland Audubon Society thereafter moved this court for an injunction substantially identical to that entered and vacated by the Ninth Circuit Court of Appeals. The court granted the injunction until the court could hear and decide the motions for summary judgment. The parties have filed extensive affidavits and memoranda in support of their positions, and oral argument has been heard.

The Portland Audubon Society contends that information concerning the habitat requirements of the spotted owl shows that the spotted owl is in danger of becoming extinct due to the destruction by logging of old-growth ecosystems as dictated by existing timber management plans; that this information obligates the BLM to address the danger of extinction in a supplemental Environmental Impact Statement; and that the continued destruction of old-growth ecosystems by logging destroys the habitat of the spotted owl foreseeably resulting in the death of birds in violation of the MBTA.

The BLM and the defendant-intervenors argue that the information relied upon by the Portland Audubon

Society is neither significant nor accurate and does not require the BLM to supplement the existing Environmental Implant Statements. Further, the BLM and the defendant-intervenors argue that all claims, other than the NEPA claim, are not properly before the court.

THE NEW INFORMATION

The Portland Audubon Society points to a number of scientific studies that have been released since the time that the BLM completed the Environmental Impact Statements for its seven western districts, including:

1. a status review of the spotted owl by the United States Fish and Wildlife Service (1982);

2. a draft of a supplemental Environmental Impact Statement prepared by the United States Forest Service analyzing the habitat requirements of the spotted owl (1986);[1]

3. a study of the spotted owl undertaken by a Blue Ribbon panel of respected scientists for the National Audubon Society (1986);

---

[1] Neither the most recent information available, including the Final Supplement to the Final Environmental Impact Statement of the Forest Service, nor the June, 1988 article of Dr. Russell Lande, can form the basis for challenging the April, 1988 decision of the state director of the BLM not to issue a supplemental Environmental Impact Statement because they were not available to the state director when his decision was made. To the extent that this information is considered, it is only relevant in evaluating the claims of the BLM and defendant-intervenors that the initial information is not accurate.

4. an analysis of the population demographics of the spotted owl by Dr. Russell Lande (1985 and 1987); and

5. an analysis of the spotted owl prepared by a team of BLM's biologists. (May 8, 1986 and January 16, 1987).

1. *A status review of the spotted owl by the United States Fish and Wildlife Service (1982)*

The report by the United States Fish and Wildlife Service states, in part:

> Although numbers [of Spotted Owls] have declined, there is still a substantial population of Spotted Owls distributed throught [sic] a broad geographical area. The species situation does not meet the Endangered Species Act of 1973 definitions of either Threatened (likely to soon be endangered throughout a significant portion of its range) or Endangered (in immediate danger of extinction). Nevertheless, the owls' dependence on large areas of old-growth coniferous forest make them extremely vulnerable. If current trends in old-growth timber harvest continue, the Northern Spotted Owl could become endangered in a relatively short time.
>
> The plight of the Northern Spotted Owl is becoming well know, [and] some action has been taken to control further loss of habitat and maintain viable populations. For example, in Oregon the Forest Service and Bureau of Land Management have been participating in the development of a Spotted Owl management plan. This plan, as originally conceived, provided for:
>
> 1. 400 pairs of Spotted Owls in the state;
>
> 2. each provided with a home range of 300 acres of old-growth surrounded by 1,200 acres

of other forest, 50% of which [was] over 30 years old;

3. habitat sufficient for 3 to 6 owls to be maintained as block management area; and

4. management areas to be located within 8 to 12 miles of one another.

Based on recent findings of more intensive research, the Oregon-Washington Interagency Wildlife Committee, a group with representation from most government entities in the two-state area, has since recommended that at least 1,000 acres of old-growth be maintained within 1.5 miles of each Spotted Owl nest site. Efforts such as those outlined above are vital to the preservation of the Northern Spotted Owl. However, their development is hampered by lack of precise or conclusive information on certain aspects of Spotted Owl population dynamics and habitat needs. We need much better data on such subjects as breeding site tenacity, dispersal of immatures, intraspecific competition, integration of new breeders into the population, and mortality/longevity, if maintenance of viable populations through management is to be assured. The number of pairs necessary to maintain a long-term viable population is also a question yet to be adequately answered.

B. RECOMMENDATIONS

1. Continue to investigate the biology, population dynamics, and habitat requirements of the Northern Spotted Owl, with particular emphasis on the conditions which promote the maintenance of a viable population. Pairs and populations currently being impacted by timber harvest or other habitat modifications are particularly good candidates for in-depth studies with important management implications.

> 2. Old-growth forest, the principal need of the Northern Spotted Owl, is essentially irreplaceable, and the precise characteristics of a "viable population" of Spotted Owls are unknown. Therefore, all habitat modification should be undertaken cautiously, with attention given to preserving as many management options as possible. For example, timber harvest at the perimeter of a large forest area would likely be more favorable to the Spotted Owl than would be cuts of similar volume that left smaller isolated forest tracts.
>
> . . . .
>
> The Northern Spotted Owl is a vulnerable species. Its need for a habitat that also has a high immediate commercial value complicates its perpetuation. Nevertheless, it is a species that has been identified as needing attention before it has been reduced to levels that are unmanageable. To prevent the endangerment or extinction of the Northern Spotted Owl, we are challenged to make comprehensive plans that will guarantee the wise and proper use of a variety of both commercial and esthetic [sic] natural resources.

The Northern Spotted Owl, A Status Review, pp. 24-25.

2. *A draft of a supplemental Environmental Impact Statement prepared by the United States Forest Service analyzing the habitat requirements of the spotted owl (1986)*

In July, 1986, the United States forest Service prepared a lengthy two-volume document entitled "Draft Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional

Guide." The draft supplement summarized current available information on the spotted owl, described the environmental relationships between the spotted owl and other resource, economic and social factors, and discussed the potential consequences of implementing either the proposed action or other alternatives. The draft supplement states, in part as to spotted owl viability:

> The implementing regulations for the National Forest Management Act of 1976, require the Forest Service to plan the management of wildlife habitats to "maintain viable populations of existing native and desired non-native vertebrate species in the planning area." A viable population, as defined in the regulations (36 CFR 219.19), is "one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area."
>
> Viability of any species is best expressed as a relative term, rather than an absolute one. This is because species and their environments are always subject to change. This dynamic situation does not allow a 100 percent assurance that any species will exist indefinitely. Further, there is no single, fixed size of a population above which a species is viable and below which it will become extinct.
>
> The assessment of the viability for the northern spotted owl population within the Pacific Northwest Region was based on a synthesis of existing data and the use of several analysis techniques. Steps in the analysis included:
>
> 1. Predictions of the amount and distribution of suitable habitat over time;
> 2. Estimates of the ability of habitat to support breeding pairs of owls; and
> 3. Analysis of genetic and demographic risks to the owls.

> The purpose of the analysis was to understand the implication of alternatives on northern spotted owls for this planning period (ten to 15 years) and further to assess the likelihood that owl populations would persist up to specified periods in the future. It should be recognized that changes in management will occur based on monitoring and research. The total habitat available for the northern spotted owl has been declining and will continue to decline as mature and old-growth forest stands are harvested. As the amount of habitat declines, it also becomes more fragmented, making it more difficult for owls to more from one patch of habitat to another. This increases the risk that one part of the owl population will become isolated from another.
>
> The decline in the amount of habitat and the increase in fragmentation make the owl more vulnerable to other threats to viability. Three major categories of these potential threats to spotted owls were analyzed. These categories were:
>
> 1. The variability of birth and death rates through time.
> 2. Loss of genetic variation.
> 3. Random catastrophes.

Draft Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide, Volume 1, pp. S-4 – S-5.

The Record of Decision of the United States Forest Service that was issued on December 8, 1988 as to the Final Supplement to the Final Environmental Impact Statement contains the following rationale of the decision to implement Alternative F:

Available information (Final Supplement, Appendix B) on spotted owl biology, habitats, and populations can be characterized by: (1) what is known with certainty, and (2) what remains unclear because interpretations are variable or research is still in progress. This decision involves natural resources, namely mature and old-growth forests, that have high values for many uses, including spotted owl habitat. Prudence dictates that my decision favor the use of information that is known with certainty. It is appropriate and necessary, however, when knowledge is incomplete to use certain information to help shape a decision and to judge the possible risks or costs of those decisions. Our analysis used all available information to estimate long-term effects of changes that would occur during the 10 to 15 year life of a Forest Plan under each alternative on spotted owl habitats and populations, and timber supplies. Models and statistical inference were used to predict these future conditions. I realize that the results of any analysis are influenced by the characteristics and assumptions of models and methods as well as by the validity of their basic data. Further, the conclusions of analyses that weigh heaviily in decisions of this sort, eventually require field verification. We cannot wait for complete field verification of all the information used in this decision. Therefore, we had to use professional judgment to interpret the relative veracity and certainty of all sources of information. In this I was most influenced by the judgment of professional biologists who have extensive field knowledge of spotted owls and their various environments.

We know a lot about spotted owls. In Oregon and Washington probably fewer than 2,000 breeding pairs of spotted owls exist, and they depend on mature and old-growth forests for

survival and reproduction. The breeding pairs require large amounts of habitat within their home ranges, more in northern Washington than in southern Oregon. Young spotted owls have limited abilities to disperse from one habitat to another. Spotted owl habitats are becoming increasingly fragmented and, in some areas, isolated from the main population. And continued existence of a well-distributed population depends on a population number and distribution that provides security from factors that can eliminate a species from an area, such as local catastrophes, inbreeding, and random variations in births and deaths. These factors increase in importance as populations become smaller and as individuals in those populations become more isolated from one another. Field data and our analyses show that, without protection of spotted owl habitats outside of reserved areas during the plan period of the next 10 years, environmental conditions could result in loss of spotted owls from significant parts of the species' current distribution. Therefore, based on the known biology and environmental situation, and to maintain a high level of population viability for spotted owls, I am directing that special measures be taken to protect spotted owl habitats and populations outside of reserved areas.

Unfortunately, there remains much information about spotted owls and their habitats that is unclear. This adds uncertainty to the decision. For example, we know only generally how much habitat is required by each owl pair in different parts of the planning area, how far and through what kinds of habitats young will disperse, and the long-term consequences of various combinations of population number and distribution on viability. Most of the information on these items is inferred from incomplete

inventories and research, theories, models, and the professional judgment of scientists who have examined only parts of the entire situation for which policy is required. Because of this and the high value of the mature and old-growth forest resources at stake I am making this an interim decision of no more than 5 year's duration, and directly tying it to the accelerated program of management, inventory, monitoring, and research on spotted owl habitats and populations. This decision will be reviewed at any time the Spotted Owl Research, Development, and Application Program provides sufficient information, but not later than 5 years from the date of this decision. Public response to the Final Supplement shows there is considerable debate about options that will remain to protect additional habitat at the end of 5 years under this direction. It is my judgment, based on the best available field information analyzed in the Final Supplement, that sufficient options will remain at the end of the 5 year period of this decision. This information shows there are currently 4,145,000 acres of spotted owl habitat in the National Forests of Oregon and Washington. At the end of 5 years, under this planning direction, there will still be about 3,965,000 acres of habitat, a net reduction of about 4.5 percent. Further, planned timber harvest will not so fragment the habitat as to preclude options to increase the long-term level of protection provided in future years should new information show that is necessary.

Record of Decision, USDA Forest Service, pp. 3-4.

3. *A study of the spotted owl undertaken by a blue ribbon panel of respected scientists for the National Audubon Society (1986)*

The National Audubon Society asked a blue ribbon panel of renowned experts on wildlife to assess the status and prospects of the spotted owl insofar as the current information allows, to specify priorities for future research, and to identify management strategies that would assure maintenance of a viable population over the long term. The panel included both ecologists and ornithologists, none of whom had taken part in the controversy over the spotted owl in the Pacific Northwest. The panel considered published as well as unpublished information, conducted a series of hearings, met with United States Forest Service representatives, and reviewed the relevant parts of the general literature concerning population genetics, demography, and the biology of extinct, threatened and endangered species. The published report was directed to prominent concerns and needs regarding the spotted owl over its range in Washington, Oregon, northwest California, and the Sierra Nevada, rather than dealing with the status of the spotted owl only in a particular administrative jurisdiction of any single agency.

The report offers the following population estimates:

> Because the Spotted Owl is a secretive animal that inhabits relatively inaccessible sites, its precise number is not known. As concern over the owl's viability mounted and research efforts increased; previous estimates were found to be asymptotic and there is no reason to expect previously undetected owls to boost the current figure substantially. E.D. Forsman (pers. comm.)

> testified that there are approximately 1500 Spotted Owl sites in Oregon, of which about half currently are definitely occupied by pairs; of the remaining half, some faction is occupied. L.W. Brewer and H.L. Allen (pers. comm.; USDA Forest Service 1986) estimated 500-600 pairs in Washington. G.I. Gould, Jr., testified that there are about 1460 known sites (where a pair of owls has been observed, young have been found between May and September, or a vocal defense of the area has been heard or solicited) of both subspecies in California (the majority of which are in the range of the Northern Spotted Owl), and that there might well be about 2100 such sites in total. By no means all of these are inhabited; for the known sites, pairs have been seen recently in 47%.
>
> The Ministry of Environment in British Columbia detected just four sites occupied by Northern Spotted Owls in 1984 (USDA Forest Service 1986). Thus, it is likely that there are between 4000 and 6000 individuals in the Pacific states.

Report of the Advisory Panel on the Spotted Owl, pp. 15-16.

The report offers, in part, the following comments on extinction:

> One might argue that species composed of few individuals can persist over time and that several hundred pairs of Spotted Owls should be sufficient to preserve the species in the area dealt with in this report: Oregon, Washington, northwest California, and the Sierra Nevada. The Whooping Crane, Snail Kite, and, possibly, Kirtland's Warbler . . . might be regarded as cases supporting this viewpoint. However, such a conclusion would be spurious. Although numbers of cranes and kites have increased dramatically on a percentage basis over the past

few years, their ranges remain so restricted and/or their habitats so specialized that a single catastrophic event could exterminate them. Similarly, the Kirtland's Warbler continues to be extremely susceptible to an unpredictable event, either on its breeding or wintering grounds. Despite concentrated major efforts on its behalf, this species has not increased in numbers over the past 15 years. In short, the increased or stabilized numbers of these three populations probably should be viewed as no more than minor interludes on a time-numbers chart; the birds are almost as vulnerable to environmental perturbation as when their respective numbers were at their lowest.

4. General lessons

What general lessons do species such as the Ivory-billed Woodpecker and/or Kirtland's Warbler provide? (1) Species with specialized habitat requirements often are incapable of altering this behavior. (2) Habitat loss thus leads inevitably to decreased numbers. (3) The decreased numbers are likely to be accompanied by fragmentation into small populations. Once the small populations start being extinguished, recolonization of their sites is so infrequent that geographic range contracts. (4) Restriction of geographic range to one or a few sites leaves a species particularly vulnerable to extinction from environmental stochasticity. (5) Thus, once a severe decline in numbers owing to habitat loss begins, it can accelerate and quickly lead to extinction. (6) Low numbers of specialized individuals are highly vulnerable to new ecological factors, and such factors are often unpredictable. Who would have thought the Brown-headed Cowbird eventually would threaten the Kirtland's Warbler with extinction, or that the Barred Owl would expand its range sufficiently to overlap that of the Spotted Owl? (7) Once a

species is reduced in numbers to some low point, its continued existence becomes increasingly precarious and large scale human intervention, often expensive, is required to prevent extinction (e.g., Kirtland's Warbler, Whooping Crane). Even so, such programs may be unsuccessful (e.g., Heath Hen, California Condor).

Although all of the species' scenarios we have discussed above have points in common with and points in which they differ from the case of the Spotted Owl, the two species that stand out as the most instructive are the Ivory-billed and Red-cockaded Woodpeckers. In each case the bird has (or had) a broad geographic range but is (or was) restricted to old-growth forest. Such forest was originally widespread throughout the bird's range, but was reduced in extent, becoming increasingly patchy. The Ivory-billed Woodpecker was eventually reduced to just one restricted population and the elimination of that population constituted extinction. The Red-cockaded Woodpecker is in the process of being reduced to small and increasingly isolated populations. Little imagination is required to see either the Red-cockaded Woodpecker or the Spotted Owl's [sic] following a tragic trajectory similar to that of the Ivory-billed Woodpecker. Because this owl seems so highly dependent on old-growth forest in most of the area with which this report is concerned, because its reproductive rates are so low and variable, and because established adults are extremely sedentary, the possibility of its extinction as its habitat is further reduced must be taken seriously. The range of the Spotted Owl is still large, a circumstance making it appear that this bird is immune to the sort of catastrophe that ultimately befell the Heath Hen. But the Heath Hen, and, more analogously, the Ivory-billed Woodpecker once had large, continuous

ranges and each of these was eventually eroded to a point where only a single, narrowly distributed population remained.

With these concerns founded on the fates of several North American bird species in mind, we urge conservatism and additional research (see VI.B) in development of management schemes for the Spotted Owl. The key point to be gained by review of the fates of other specialized North American bird species is that a conservative approach is essential. Currently available options must not be foreclosed. In particular, if the number of owls is reduced below some as yet undetermined minimum, extinction might ensue so quickly that no action could stop it.

Id. at 24-25.

The report offers the following recommendations:

Most of the remaining habitat suitable for Spotted Owls in Oregon, Washington, northwest California, and the Sierra Nevada is on public land administered by several agencies, primarily the Forest Service. The management plan being developed by this agency will inevitably involve a reduction in habitat available for these owls as timber harvesting proceeds. The specialized habitat requirements of the Spotted Owl, which extensively involve old-growth Douglas-fir in northwest California and the Pacific Northwest, will undoubtedly make a decline in the population of this bird a prominent consequence of this reduction. Depending on the management alternative adopted, this could involve over half of the Spotted Owls currently living in this area. Such a conscious decision for population reduction to a critical level in a non pest species must surely be unique in the history of wildlife management.

The current population of Spotted Owls in California, Oregon, and Washington already is as low or lower than some of the species or subspecies considered by the USFWS to be endangered. Historically, population declines and/or extinctions of North American birds precipitated by human actions have been based on ignorance of one sort or another. However, in this case a considered judgment of a federal agency could begin or accelerate an irreversible decline in the Spotted Owl in northern California, Oregon, and Washington. We caution that more may be involved here than the maintenance of a viable population of a single species of vertebrate. The role of the Spotted Owl as an indicator of the condition and extent of old-growth Douglas-fir forest inevitably links its status with that of some basic relationships concerning energy capture and nutrient recycling within old-growth that are probably of inestimable functional importance to the overall ecology of the Pacific Northwest.

The Advisory Panel has attempted to be as risk-averse as possible in the development of its recommendations for Spotted Owls over the area of Washington, Oregon, northwest California, and the Sierra Nevada. While no recommendations can be risk-free, we do believe that ours give a reasonable chance of protecting the birds in the near term, as well as avoiding the foreclosure of options that may be needed as further information is obtained. The best prospect is the maintenance of a sufficient number of Spotted Owls over a broad enough area and it is this combination our recommendations are designed to provide.

The crucial parts of our recommendations, of course, deal with the number *and* distribution of Spotted Owls that we judge to provide a reasonable prospect for maintaining a viable

population in Oregon, Washington, northwest California, and the Sierra Nevada. Nonetheless, it is vital that we also offer guidelines concerning implementation of any management plan and the research needed to put management of the owls on the firmest basis possible. We therefore put forward our recommendations organized into three categories reflecting these conditions.

B. Recommendations Concerning Numbers, Home Ranges, and Distribution of Spotted Owls

(1) *The management program for Spotted Owls in Oregon, Washington, northwest California, and the Sierra Nevada should be directed to maintenance of a minimum total of 1500 pairs of these birds* (see III.C-E). This number is based on recent surveys indicating a *confirmed* population for this overall area of approximately 2000 pairs of Spotted Owls. The Advisory Panel believes that 1500 pairs is an absolute minimum for providing any prospect for long-term survival of the Spotted Owl in northwest California, the Sierra Nevada, and the Pacific Northwest. We are marginally comfortable with this number (which is similar to those characterizing several of the birds listed in Table III.1) only because the Spotted Owl has a widespread and relatively uniform distribution over this area, in contrast to the restricted distributions characterizing most birds currently regarded as endangered. Our numerical recommendation is thus predicted on the maintenance of this broad distribution. To put the minimum number of 1500 pairs in perspective, we must point out that it represents a decline of 25% from the presently confirmed level of 2000 pairs for the area to which our

recommendation pertains. We believe that management proposals involving any smaller numbers of Spotted Owls are unrealistic and incapable of ensuring viability, especially in the absence of firm date concerning important as aspects of the owl's population dynamics.

Regarding implementation of this recommendation, we assume that responsibility for maintenance and monitoring of the local populations of Spotted Owls must involve a broad spectrum of federal, state, and private organizations. The Forest Service manifestly will have to assume the lead role in these activities, by virtue of the extensive areas of habitat contained in the national forests. However, the Bureau of Land Management will also have a particularly vital role to play. Indeed, the completion of the habitat network critical to sustaining a proper distribution of the owls is heavily dependent on BLM lands in Oregon.

(2) *Current geographic distribution of the Spotted Owls in Oregon, Washington, northwest California, and the Sierra Nevada should be maintained through a habitat network system like that under development by the Forest Service and cooperating agencies* (see III.D-E., IV., V.B., V.D.). As noted above, this recommendation is inseparable from that specifying the number of pairs of owls. All habitat management areas targeted for the network must have specific map locations that are readily identifiable by the public. The need is to provide *immediately* for a sufficient number of breeding pairs of owls. Because the present network system includes many habitat areas that are unoccupied by Spotted Owls, and equal number of "interim" home ranges with known breeding pairs should be added to the network until the areas originally included in the network plan are shown to contain breeding pairs. These interim home ranges should be

compatible with the dispersal guidelines used to develop the network. To assure that the network is fully integrated, it is especially important that the segment of it on lands administered by the Bureau of Land Management between the Coast Range and the Cascades in Oregon be included. It is equally critical that all existing home ranges in the Shasta County, California, portions of the Shasta and Lassen National Forests be protected to sustain the linkage across State Highway 299 between the Sierran and northwest California segments of the Spotted Owl population with which we are concerned. Acquisition of private land containing active home ranges in this care could significantly contribute to maintenance of this linkage.

(3) *The view that an effective breeding population of 500 always suffices to maintain sufficient genetic variability for subsequent evolution in changing environment should be discarded from management formulations* (see III.D). As we note in this report (III.D.1), the value to 500 for effective population size (N_e) rests on a poor model applied to one trait in fruit flies. No particular value of N_e can guarantee adequate genetic variability against all environmental contingencies. Moreover, one cannot specify the probability that sufficient genes will exist in a population of particular size without defining the magnitude and nature of the changes confronting it. Unfortunately, these changes cannot be forecast. Therefore all one can say is that the species may be endangered by insufficient genetic variability and that there are fewer alleles, other things being equal, in small populations than in large ones. The Advisory Panel believes that adverse developments for the Spotted Owl arising from demographic and environmental stochasticity are more immediate concerns than loss of heterozygosity and possible inbreeding depression.

> (4) *Habitat areas that include 4500 acres (1823 ha) of old-growth forest should be retained for pairs of Spotted Owls in the Washington portion of the network. Habitat areas for accommodating pairs in Oregon and northwest California should provide 2500 acres (1013 ha) of old-growth. On the basis of preliminary information, we recommend that the figure for old-growth in the home ranges of pairs of Spotted Owls in the Sierra Nevada be 1400 acres (567 ha).* (See IV.) Because certain home ranges with less than the prescribed area of old-growth forest are known to support breeding pairs of Spotted Owls, deviations from the prescription may be allowed, contingent on adequate documentation and approval of a standing committee of experts, the majority of which is drawn from neither the agency involved nor industry. Relaxation of these prescriptions concerning habitat areas should be permitted only if research establishes unquestionably the safety of such an action.

Id. at 31-33 (emphasis in original).

4. *An analysis of the population demographics of the spotted owl by Dr. Russell Lande (1985 and 1987)*

In 1985, Dr. Russell Lande released a scientific review of the population demographics of the spotted owl. Population demographics are important because they are the only means of looking at the species as a whole rather than looking at what happens to individual pairs of owls.

Dr. Lande's study in 1985 was specifically directed at owl populations on Forest Service lands. Dr. Lande's report evaluated the likely effect of the Spotted Owl Management Plan proposed by the United States Forest Service for maintaining viable owl populations. Dr. Lande

asserts in his report that the low juvenile survivorship of spotted owls may result in serious danger of extinction of the owls as a species in the near future.

Dr. Lande explained that young spotted owls are fledged in the summer and disperse long distances in the fall (dozens of kilometers). Dr. Lande states that under primitive conditions, before historical settlement of the Pacific Northwest by white men, roughly sixty to seventy percent of the forest consisted of old-growth forests, with the remaining area in the younger categories due to fire and other natural disasters.

Dr. Lande notes that under the Forest Service Management Plan, described in the Regional Guide for the Pacific Northwest Region (1984), habitable territories for the spotted owl would comprise about six percent of the total forested area in the affected national forests. Dr. Lande concludes that it may not be easy for juvenile spotted owls to find habitable territory in such circumstances. Dr. Lande concludes:

> The Forest Service SOMP [Spotted Owl Management Plan] is based mainly on genetic considerations, which suggest that an effective population size of 500 is the minimum necessary to ensure the genetic variability required for adaptability and long-term survival of the population. However, as explained above, demographic analysis appears to be a primary importance for management of the northern spotted owl.
>
> For spotted owls the effective population size is about half the actual population size, mainly because of the large variance in reproductive success among individuals (Barrowclough and Coats, 1985). In planning for 500

SOMAs the Forest Service plan would meet the objective of an effective population size of 500, if every SOMA were always occupied by a breeding pair. However, a substantial fraction of habitable territories are now unoccupied. The SOMP fails to account for the expected decrease in the occupancy of habitable territories at demographic equilibrium caused by increasing the average distance between habitable territories. This increases the risk of death for dispersing juveniles, which should not be assumed to be perfectly capable of searching out and finding rare habitable territory.

> An effective population size of 500 is probably about the minimum necessary to ensure normal amounts of genetic variability in most characters, and adequate adaptability to changing environmental conditions, although it does not provide much of a safety factor (see Lande and Barrowclough, 1985). It should be stated that the documents from which the Forest Service drew this number are all based on a paper by Franklin (1980) which is predicated on the (admittedly) unrealistic assumption that natural selection is absent. Franklin's number was itself derived from limited data on the maintenance of genetic variability by spontaneous mutation compiled by Lande (1976), and Franklin, aware of the limited data base and the simplistic nature of his derivation, was duly cautions about suggesting it. Although more thorough analysis has confirmed Franklin's number as being about the right order of magnitude (Lande and Barrowclough, 1985) it should be emphasized that there is still substantial scientific uncertainly in it.
>
> On genetic grounds alone it would be possible to argue that the effective population size

necessary to ensure long-term viability is considerably larger than 500, due to scientific uncertainty regarding the various parameters entering into its derivation. In view of the substantial scientific uncertainties involved, the practice of managing rare populations down to the minimum size recommended by experts (without a substantial safety factor added) is probably dangerous to their survival, especially when, as in the present case, little allowance has been made for possible demographic problems.

V. *Conclusion*

From the available information on the life history and demographic characteristics of the northern spotted owl, I concluded that under current conditions the population of the spotted owl may already be declining and in danger of extinction within the next century. Further habitat alteration, as planned by the U.S. Forest Service, is very likely to cause the extinction of the spotted owl from the management area on a shorter time-scale.

Report on the Demography and Survival of the Northern Spotted Owl, pp. 24-26.

5. *An analysis of the spotted owl prepared by a team of BLM's biologists (May 8, 1986 and January 16, 1987)*

On May 8, 1986, the BLM issued its own "Northern Spotted Owl Analysis." This analysis reported, in part:

The Bureau is harvesting 200 year old and greater forests at the average rate of 15,000 acres per year. At this rate the old-growth will be gone from the Salem, Eugene, and Coos Bay Districts in 20 years, the Roseburg District in 30 years, and Medford in 40 years. In California, at

current harvest levels, it is estimated old-growth forests will be depleted in 20 years.

. . . .

Federal agencies manage 4,700,000 acres of old-growth forest land (95 percent). Therefore, any action taken by Federal land managers has a large impact on the spotted owl habitat. Conversely, private, state, and tribal actions have very little.

. . . .

In Oregon, Bureau interim protection measures resulted in identification and interim establishment of 90 spotted owl management areas (SOMAs). Seventy nine SOMAs are located in older forest retention and other set-aside areas, and the remaining 11 are temporarily being protected outside of . . . these retention areas, without reducing allowable cuts. Based on Oregon Department of Fish and Wildlife analysis in 1985, of the 90 SOMAs, they found the average SOMA contains 800 acres of older forest type, and range in size from 24 to 1,311 acres of this type.

. . . .

B. *Population*

The spotted owl currently remains widely distributed in suitable habitat throughout its recent historical range. The best population estimate is that 1,500 to 2,500 occupied spotted owl sites exist within the species range. Available evidence indicates that the population is declining throughout its present range in Washington, Oregon and California. No owl population trend data is available for British Columbia. Inventory and monitoring data suggest a range of one to four percent annual population decline that varies by state. However, the data is weak on

this subject due to annual differences in inventory and monitoring efforts. The major factor in this decline is fragmentation of habitat due to timber harvesting. . . . There is no evidence that indicate[s] biological factors, i.e., disease, adult mortality or predation, are exhibiting any major unnatural impact on the survival of spotted owls.

Cumulative inventory and monitoring records that have been compiled on the spotted owl population during the last 10 years may have left the false impression that the owl population is stable to increasing. However, several factors must be considered; (1) new owl sites are being found but no new habitat is being created, (2) owls often just shift to adjacent habitat or disappear after logging, (3) adult owls appear to have a low mortality rate, (4) sites where owls were once located often remain on monitoring records long after the habitat is removed, (5) adult owls may remain in their habitat area long after logging has eliminated suitable habitat (site tenacity).

Data is lacking on the demography (life expectancy, reproductive age, survivorship, age structure, longevity, population trend, age at first breeding) of spotted owls due to the short time frame which research has been directed at answering these questions. It is known that there is a high annual fluctuation in the percent of the population that breeds. In Oregon, a high percent of breeding failures were reported during the following years[:] 1982, 1984, and 1985. Documented nesting success of spotted owls has ranged from 16 to 89 percent in Oregon and 0 to 45 percent in California. It is suspected that prey abundance and availability may have an important relationship between spotted owl habitat selection and reproductive success. Ongoing research being conducted through the Old-

Growth Forest Wildlife Habitat Program, Pacific Northwest Forest and Range Experiment Station may provide a better insight into the relationship between the fluctuations in spotted owl reproduction and prey availability.

During the years 1982-1985 over 100 juvenile spotted owls have been tracked, using radio telemetry techniques in Oregon, Washington, had California, Juvenile owl mortality has approached 100 percent during the last three years of dispersal studies. It has not been determined if any of the young owls were recruited into the adult breeding population. Most of the owls died or were lost during the studies making it virtually impossible to document meaningful juvenile survival rates. However, it is estimated that current juvenile survivalship is below the level needed to maintain a stable population. The dispersal studies have contributed valuable information on juvenile dispersal. Research has shown that juvenile owl dispersal is random is direction and ranges up to 62 miles with the average distance in the 15 to 28 mile range. The research findings and other general observations of juvenile owls have shown that they frequently cross open habitats to reach blocks of mature and old-growth forests. The young owls do not seem to select any particular habitat types in these open areas for roosting and foraging and frequently succumb to predation and starvation. The open habitats may be effective barriers to dispersal and the owl's use of these areas may contribute to the high mortality rate. There is speculation that radio transmitters placed on juvenile owls may be a cause of mortality. This subject needs further research.

Mammals, and particularly flying squirrels, woodrats, red tree voles and deer mice, comprise the highest percentage of the spotted owl's prey base. All the species were found to use old-

growth Douglas-fir/western hemlock forests for optimum breeding and foraging habitat. Woodrats, red tree voles and deer mice were found to exhibit strong association with old-growth Douglas-fir stands in northwestern California. Research on spotted owls indicates that breeding success is the best measure of habitat quality and that breeding success is highest during periods when there is a high percentage of large prey (woodrats and flying squirrels) in the owls' diet. A research project was begun during 1986, in southwestern Oregon that is directed at determining why spotted owls show a strong preference for old-growth forests over younger stands. The study will investigate the distribution of spotted owls; prey species and how this distribution influences the owls' foraging strategy.

Timber harvesting is increasing forest habitat fragmentation (creating open habitat) and altering forest structure which in turn favors the emigration of both great horned and barred owls. Great horned owls and goshawks are known to occur within the home ranges of spotted owls and may prey on both adults and juvenile owls. Documented predation on spotted owls is limited to a few kills of juveniles by great horned owls. The density of great horned owls, red-tailed hawks and goshawks appear to increase as the habitat is opened by logging which has the effect of concentrating these raptors in the remaining old-growth stands. The concentration of raptors often leads to interspecific conflicts and predation. Predation is a natural mortality function in life cycles and is not usually a significant factor in population declines unless a population is already below the threshold level. Many other birds interact

with the spotted owl, these include ravens, Cooper's hawks, scrub jays and other smaller forest birds.

There is no evidence that spotted owls are disturbed by most of man's activities in the forest, except logging. . . .

. . . .

D. *Analysis*

Since 1800 the area of old-growth forest type within the range [of] the spotted owl has declined from 15,000,000 acres to 4,972,000 acres. Of this remaining acreage 57,000 acres per year is being harvested from federal lands. In Oregon, 77 percent of the suitable spotted owl habitat on non-federal land was harvested between 1961 and 1985. During this same period spotted owl habitat in Washington was reduced 81%. If these trends continue, the non-Federal habitat will be gone in Washington in 1988 and gone in Oregon in 1989.

BLM currently has 683,450 acres of old-growth (196 + years), 12% of the total available in the area of spotted owl occurrence 352,154 acres of this is available for harvest. At the current harvest rate, 17,000 acres per year, all of the old-growth subject to harvest will have been depleted by the end of four decades. This rate of habitat decline corresponds closely with the estimated rate of spotted owl population decline. However, all of the remaining old-growth forest type on BLM land is not suitable habitat. Most is fragmented into small blocks, other areas classified as old-growth have been selectively harvested to reduce tree density, and other areas do not have necessary habitat characteristics for spotted owl.

As timber in suitable habitat areas is harvested there will be increasing fragmentation. This will cause habitat loss at a much greater rate than the actual reduction in old-growth forest acreage. There are suggestions that if current cutting levels continue for the next four years the BLM will no longer have the options of providing: (1) additional spotted owl management areas (SOMAs); (2) habitat corridors between key population segments; and (3) multiple owl SOMAs. BLM lands in the coast range provide crucial links between USFS lands in the Coast and Cascade ranges. Without the above options the spotted owl populations in the coast ranges of Oregon and California may be genetically isolated from the primary population in the Cascades. It has been suggested that all of these population segments have to be maintained and linked in order to have a self sustaining breeding population.

E. *Findings*

From this analysis there are several relationships and conclusions that can be made.

1. Spotted owls pairs use large amounts of old-growth forest type (average is 2200 acres) in their home range.

2. This habitat type is being reduced and fragmented.

3. Major prey species are highly associated with old-growth forest.

4. Fragmentation results in larger home range.

5. Larger home range and reduced prey base requires a greater expenditure of energy for foraging.

6. Higher energy expenditures result in lower nesting success.

7. Juvenile mortality approaches 100% in fragmented old-growth forest type.

8. Spotted owls show a strong preference for old-growth forest.

9. There is no evidence that anything other than habitat loss is affecting spotted owl populations.

10. Habitat loss and deterioration is associated with the following:

- increased habitat for predators and competing species

- decreased availability of prey species

- increased susceptibility and potential for higher mortality

- reduced nesting success

- reduced thermal cover

Northern Spotted Owl Analysis, pp. 8-20.

On January 16, 1987, the BLM issued a second document entitled "Draft Northern Spotted Owl Analysis," which contains the following findings:

From our review of existing information, we conclude:

- Spotted owl and old-growth forest management is a complex resource management issue, involving biological, economic, and legal considerations.

- Spotted owl populations are declining throughout their range.

– While there is some evidence the spotted owl is being displaced in some locations by the barred owl; and predators, such as the great horned owl, are reducing spotted owl populations in some areas; in the main, the evidence indicates spotted owl decline is related to habitat loss and fragmentation of the habitat.

– The scattered nature and amount of BLM old-growth forest lands indicate actions BLM takes to maintain the spotted owl should be done in consort with other landowners. Other agency land management actions may have a greater impact on maintenance of spotted owl populations, than will Bureau actions.

Bureau lands may provide links between owl populations in the Coast and Cascade ranges, in northern California, and between Bureau lands and other ownerships. The site-or area-specific relationships of these linkages is unclear.

– There is a wide-ranging amount of research, study and monitoring information, presently available, related to the northern spotted owl. While these efforts are continuing, there are areas where information is lacking.

– Research, studies and monitoring, no matter how extensive, will probably never be conclusive; however, the Bureau should decide on a policy based on existing knowledge.

Draft Northern Spotted Owl Analysis, pp. v-vi.

On May 8, 1987, the BLM issued a third analysis entitled "Northern Spotted Owl Analysis, Bureau of Land Management." This document is essentially the same as the January 16, 1987 document, but contains the following Executive Summary:

Northern Spotted Owl Analysis
Executive Summary

This summary highlights the significant information from the analysis of the northern spotted owl on Bureau of Land Management lands in the Pacific Northwest prepared by an interdisciplinary team of Bureau specialists. In addition to containing more detailed information on these summary topics, the analysis includes material not found in this summary.

The Assignment

In March 1986, the Bureau of Land Management appointed a team of specialists to review the status of the northern spotted owl on BLM lands in western Oregon and Washington, and in northern California. The team was to identify key questions of concern to Bureau managers; to review the existing scientific information about the owl; and identify gaps in that information and where uncertainty exists. Current research, studies and monitoring related to the biology of the owl and its associated habitat were to be reviewed, and no new studies were to be initiated. Current Bureau policies and procedures were to be identified; legal aspects of six statutes were to be analyzed by the Department's Solicitor's Office; and the economic and community stability implications of spotted owl management were to be examined.

The Biological Situation

The northern spotted owl occurs in the forested areas of southwestern British Columbia, western Washington, western Oregon and northwestern California. Information from research, inventories, and monitoring programs indicates that the population may be declining in the region from

one to four percent annually. Spotted owls show a strong preference for old-growth and use mature forest types in their daily and yearlong activities. In Oregon, research indicates home ranges include an average of 2,200 acres of old-growth forest and in Washington the average is nearly 5,000 acres. Research findings indicate that old-growth forests provide conditions for the optimum number of spotted owl prey species. In addition, they provide conditions that make prey available, cavities suitable for nesting, thermal cover, and protection from predators.

Loss of old-growth forest and forest fragmentation appear to be the major contributors to spotted owl population declines. Forest fragmentation results in larger home ranges, greater expenditure of energy for foraging, decreased probability that dispersing juvenile spotted owls will locate suitable habitat, and habitat loss and unsuitability at a greater rate than the actual reduction in old-growth/mature forest acreage.

Habitat managed by BLM may play a crucial role in maintaining genetic links between habitat areas and sustaining a proper distribution of owls throughout their historical range.

. . . .

At the current rate of harvest of both old-growth and mature forests on BLM lands in the region, nearly 592,000 acres subject to harvest will remain standing at the end of 1990. Coupled with the 248,500 acres of old-growth/mature forest lands already withdrawn from timber harvest, a total of about 840,000 acres will remain standing at the end of 1990. If there are no BLM forest land use plan changes in western Oregon, and harvest levels of old-growth/mature forests remain at the present levels, the old-growth/

mature habitat subject to harvest will be depleted in approximately 25-30 years. The 248,000 withdrawn acres of old-growth/mature forests, however, would remain. There would also be additional acres of mature forest due to the growth of present 70, 80, and 90 year old stands.

Although uncertainties exist throughout the information base on spotted owls, many credible scientific findings are included in the growing literature base. Over twenty study/research projects are currently underway on spotted owl biology and habitat requirements in the States of Oregon, Washington and California. Findings from many of these research efforts should be available for reference in the next five years while others may not be available in the long-term – 10 years. There is sufficient information now documenting that if planned timber harvest continues, further decline of the owl population on BLM lands will occur. Additional research is needed for making decisions on maintaining individual owl sites and population viability.

The U.S. Forest Service's 1987 budget allocates $1.5 million dollars for new spotted owl research which will allow investigation of areas where the existing information base on the spotted owl is deficient. In addition, their budget provides for $1 million dollars for spotted owl monitoring.

Economic and Community Stability Considerations

Withdrawing 1,200 acres of commercial forest land for a spotted owl management area (SOMA) would result in foregoing net timber income annually ranging from a high of $112,800 in the Coos Bay District to a low of $40,800 in the Medford District. If the SOMA were expanded to 2,200 acres, the net timber

income foregone annually would be approximately 83% greater than that with 1,200 acres.

Withdrawal of a 1,200 acres SOMA in western Oregon would result in a reduction of an average of 21 jobs. Reduction in jobs per 1,200 acres withdrawn from the allowable cut ranges from a high of 28 jobs in Coos Bay to a low of 12 jobs in Medford. These would be jobs directly related to timber harvest and processing, BLM jobs, and those indirectly related to the forest products industry (e.g. retail stores, restaurants). The economic impact on communities would vary depending upon the number, size, and timber productivity of SOMAs withdrawn and the relative dependency of the communities on the forest products industry.

. . . .

Management Concerns

The key issue in the BLM decision to harvest or not harvest the remaining old-growth/mature timber is the uncertainty of the effect of this decision on the overall viability of the owl population. While the significance of BLM lands in maintaining genetic links between other owl populations and population viability is not well known, research on other species and the accepted principles of island biogeography suggest that these lands may provide a critical link.

There are a number of land management options ranging from no harvest to unconstrained harvest of spotted owl habitat. If suitable spotted owl habitat is not harvested, this preserves maximum options for managing owl habitat. In the future, if it is determined that BLM forest lands are not critical to the overall viability of the owl population, those lands could be harvested. However, timber income

and jobs would have to be foregone, at least in the short term.

If suitable spotted owl habitat is harvested at the planned rate, an irreversible decision, there is a risk of losing future options for managing owl habitat. If, in the future BLM lands are determined to be not critical, then harvesting the timber would be a net gain because timber production, income and jobs would not have been foregone.

Federal listing of the spotted owl as threatened or endangered, and/or legal interpretation of the O & C Act would modify any options chosen.

Northern Spotted Owl Analysis, Bureau of Land Management, pp. i-iv.

THE HEARING

In addition to the documentary evidence presented, this court held an extensive evidentiary hearing in which evidence was presented by all parties as to the accuracy of the new information and the conclusions drawn from it.

The Portland Audubon Society presented the testimony of three scientists who testified as to the current state of knowledge and the danger of extinction of the spotted owl: Dr. Gordon Orians, Dr. Russell Lande, and Alan Franklin.

Dr. Orians, a professor of zoology and environmental studies at the University of Washington, testified that he has reviewed the BLM's Spotted Owl Environmental

Assessment dated February 3, 1987, and there is no biological basis for the assertion in the Spotted Owl Environmental Assessment that old-growth forest logging will not adversely affect the spotted owl so long as more than 1,300 acres of owl habitat is maintained in each spotted owl site. Dr. Orians testified that the logging of the habitat of the spotted owl as proposed increases the risk of extinction of the spotted owl because logging fragments the spotted owl's habitat.

According to Dr. Orians, fragmentation of the old-growth habitat of the spotted owl poses the greatest threat to the spotted owl's survival as a species because as habitat declines, the spotted owl finds it increasingly difficult to reproduce. This is due to a high juvenile owl mortality during dispersal, increased difficulty in finding vacant breeding territories, and declining breeding success associated with increased energy expenditures in searching for food in the more fragmented environments.

The Portland Audubon Society also presented the testimony of Dr. Russell Lande. Dr. Lande testified that preserving essentially all of the remaining spotted owl habitat is necessary to protect the long-term viability of the spotted owl. Dr. Lande testified that the Spotted Owl Environmental Assessment and the district-wide Environmental Impact Statements were based on the fundamental error that the spotted owl's survival would be assured by protecting discrete "islands" of habitat in a "sea" of clearcuts and tree farms. According to Dr. Lande, territorial habitat specialists such as the spotted owl generally become extinct long before all of their habitat is

lost because territoriality sets a limit on population densities and as the remaining habitat becomes more fragmented through destruction, dispersing juvenile owls find it increasingly difficult to find existing vacant territories. At some point, well before the complete loss of territories, the rate of recolonization declines faster than the rate territories are vacated due to the death of the residents, thereby leading to the extinction of the population.

Dr. Lande's analysis utilizes the concept of a metapopulation (a large population made up of many smaller units) maintained by a balance between Local extinction and colonization. On the assumption that territories are randomly or evenly distributed across the region, Dr. Lande's model, as presented in his 1988 article, predicts the effect of future habitat loss on the occupancy of territories. Dr. Lande concludes that the vast majority of the remaining old-growth forest must be preserved in order for the population of the spotted owl to remain viable.

Dr. Lande testified that his analysis was optimistic in several important respects. He assumed that there was no difficulty in spotted owls finding mates, no dispersal of juveniles out of regions containing old-growth timber, no demographic or environmental catastrophes, and no loss of fitness due to inbreeding in small populations. In addition, Dr. Lande assumed that the spotted owl territories designated to be protected by government agencies would, in fact, support spotted owl pairs in the future. Dr. Lande testified that violation of any of these assumptions would make population viability more difficult.

To summarize, in Dr. Lande's opinion, all of the remaining spotted owl habitat must be protected in order to assure with reasonable probability the long-term survival of the spotted owl. Dr. Lande knows of no scientific basis for concluding that further habitat loss will not jeopardize the survival of the spotted owl. Dr. Lande contends that all available evidence is to the contrary.

Finally, the Portland Audubon Society presented the testimony of Alan Franklin, a wildlife scientist with extensive familiarity and experience working with the spotted owl. Franklin testified that clearcut and shelterwood logging (even-aged silviculture) of forests which provide habitat for the spotted owl threatens the survival of the species, and that even-aged silviculture adversely affects the spotted owl because it destroys nest trees and core areas – the areas of primary use by spotted owl pairs; it destroys foraging habitat at a particular site suitable for use by a breeding pair of spotted owls which leads to the decreased availability of prey and the need for increased energy expenditures by spotted owls for foraging thereby causing reduced breeding success; it causes fragmentation of the spotted owl's habitat across the landscape which leads to the increased risk of juvenile dispersal mortality due to increased predation and starvation; and it causes reduced density of breeding sites across the landscape which leads to reduced site occupancy.

Franklin testified that the BLM (in its Spotted Owl Environmental Assessment, timber sale assessments, district-wide Environmental Impact Statements and wildlife biologists' testimony) addresses only the first two of these effects – core area and foraging habitat loss at a

particular spotted owl site. Franklin contends that the BLM fails to address the major threats to the spotted owls' survival as a species – that is, fragmentation of habitat and reduced density of breeding sites across the landscape.

Franklin explained that spotted owls are a territorial species. Each breeding pair of spotted owls occupies a "site" of several thousand acres in size. A spotted owl pair may occupy a site for up to a decade or more. Young spotted owls, having fledged, disperse from their natal site to search for a vacant site to colonize. For most of the spotted owls' evolutionary history, spotted owl sites were contiguous across the landscape, generally uninterrupted by open areas or younger forests. Young spotted owls enjoyed relative security during dispersal because much of their dispersal was through older forests where prey was available and predators infrequent.

Franklin concluded that logging has greatly changed the spotted owl's environment during the last 100 years. He contends that today's forest is a patchwork quilt of stands of old forest mixed with fresh clearcuts, young plantations and intensively-managed tree farms – that is, fragmented remnants of the previously contiguous old forest. Fragmentation of the spotted owl's habitat is not the result of one large "timber sale," says Franklin, but the result of many small logging operations. Any one of those harvests may appear insignificant, but has the effect of threatening the spotted owl's survival as a species, concludes Franklin.

The BLM presented the testimony of a number of BLM employees regarding the specifics of the five 1988

timber sales enjoined and the effects of the proposed injunction on the timber management plans of the seven districts. The BLM relies upon the testimony of William Neitro, a BLM wildlife biologist, who testified, in part as follows:

> BLM signed an Agreement with ODFW [Oregon Department of Fish and Wildlife] in 1983 to maintain the habitat for 90 pairs of spotted owls. Monitoring data collected by BLM between 1983 and 1986 indicated that the pair occupancy rate of the 90 sites ranged between 67-72 percent.
>
> In late 1987, ODFW expressed their concern that the 90 spotted owl sites were not adequately occupied by owls and reported that occupancy of paired owls was not satisfactory. The ODFW Director proposed to BLM that at least 110 spotted owl sites should be managed by BLM to assure the maintenance of sufficient habitat for 90 pairs of owls. The BLM State Director agreed to the proposal and charged BLM biologists and area managers to meet with ODFW biologists and to work out a site selection process. Several meetings were held between the biologists of each agency that resulted in three sets of criteria to be used to guide spotted owl site selection: Occupancy, distribution and size of site (acres). Each criteri[on] was deemed of equal importance although within each major criteri[on] priority conditions in descending order were established as follows:
>
> *Occupancy*
>
> 1. Occupied by a pair of owls.
> 2. Occupied by a single owl.
> 3. Site recently occupied but present status unknown.
> 4. Historically occupied but not now.

Distribution

1. Even distribution is most desirable.
2. East-west connection must be maintained.
3. North-south connection with USFA in Coast Range[.]
4. Extension of range in north coast is desirable.

Size of Spotted Owl Area

1. Home range determined by telemetry data.
2. 2,200 acres of mature and old growth within 1.5 mile radius.
3. 2,200 acres of mature and old growth within 2.1 mile radius.
4. Best available habitat in actual use.

Thus under the occupancy criteri[on], [a] site occupied by a pair of owls would be selected over a site occupied by a single owl. The initial site selection group agreed on the following broad selection assumptions:

(a) Lower quality habitat was acceptable in the Salem District because the sites are essential to distribution.

(b) Spotted owl viability cannot be met on BLM lands along.

(c) BLM and the Forest Service have an opportunity to share management of some spotted owl areas.

(d) The habitat quality of the sites not selected is lower.

(e) The spotted owl population on the north coast is isolated from the remainder of the Oregon population. Sites were selected there to meet the long term goal of recovery.

(f) East-west habitat connectors are essential and the Eugene District needs additional sites in the long term.

The initial selection of the 110 sites was made by BLM and ODFW biologists with critical review by BLM area managers. Each selected site was closely reviewed by ODFW biologists to determine how it rated with the selection criteria, occupancy, distribution, and size of area. The ODFW biologists also selected owl sites that did not overlap with adjacent owls, sites that were not located in protected (withdrawn) areas, and sites that could become future links to isolated habitat. In the final selection of spotted owl sites to be maintained by BLM through year 1990, one hundred and eight (108) of the 110 sites were occupied by pairs in the last two years (1986 and 1987). The State Director of BLM and the Director of ODFW signed the new Spotted Owl Management Agreement on December 22, 1987. (See attached map.)

In Oregon, the BLM lands provide several crucial links for spotted owl habitat between the major landholdings of the Forest Service and links between the coast and Cascade Mountains.

The location of BLM lands in the foothills of the coast and Cascade Mountains make it feasible to maintain up to five cross valley links; one at Eugene across the Willamette Valley; one or two at Roseburg across the Umpqua Valley; and one or two across the Rogue Valley in the Medford District. BLM lands and known owl sites also provide the only connector between the Cascade Mountain Range in Oregon with potential spotted owl habitat in north central California. In the Coast Range Mountains the older forest habitat on BLM lands provide three extremely crucial linkages that are assumed to be required to maintain self-sustaining populations of northern

spotted owls in the coast range. These links include spotted owl habitat located in northwestern Oregon that may provide the only future connecting habitat between Oregon and the State of Washington. Because of BLM's checkerboard land ownership pattern, it was recognized by BLM biologists in the late 1970's that to have some degree of a functioning ecosystem management strategy (that included old-growth forest habitat) on the O & C forest lands in western Oregon would require some type of corridor or linking of blocks of older forest habitat. At this early date, potential corridors were mapped that included linkages within and between BLM districts and other major connections with adjacent Forest Service holdings. This corridor map was shared with each National Forest office where habitat linkages were feasible (Siskiyou, Siuslaw, Rogue, Umpqua, Willamette and Mount Hood Forests). At this time BLM recognized that self-sustaining populations of northern spotted owls could not be maintained exclusively on BLM lands, however, that these lands had a vital role in the maintenance of spotted owls in western Oregon, especially in the Coast Range Mountains. Thus, during the development of the 1980 land use plans several BLM districts selected spotted owl habitat (owl sites) that would provide the best distribution while also allowing for linking with owl sites identified by the Forest Service. Some joint spotted owl habitat management areas were also identified during this process. Without these crucial linkages or connectors of older forest blocks or spotted owl habitat sites, the owls located in the Coast Range could be relegated to a series of isolated populations.

Neitro offered the following comments on Dr. Orians' testimony:

(a) BLM has given special consideration to the effects of habitat fragmentation on th[e] spotted owl for over eight (8) years, beginning in early 1979 when the initial spotted owl management areas (SOMAs) were identified. It is well known that the majority of the BLM lands and spotted owl habitat sites are highly fragmented due to the basic landownership pattern. In spite of the highly fragmented habitat, spotted owl nesting (reproduction) has been documented at 168 sites during the last three years with 84 percent or 142 sites successfully producing young (Exhibit A). A total of 221 young spotted owls have been documented on BLM spotted owl sites during the last three years. The recently signed BLM/ODFW agreement further documents BLM's concern for the selection maintenance of the best available habitat within 2.1 n[illegible]s of the core area of spotted owl sites.

(b) BLM has conducted monitoring on numerous spotted owl habitat sites ranging from 10 to 15 years. BLM's monitoring guidance was developed in 1986 and requires seven (7) visits to each owl site to determine occupancy and two visits to determine reproduction. BLM District offices have been using similar monitoring techniques dating back to 1984. BLM has also expended over one (1) million dollars on spotted owl monitoring since 1983. Annually, BLM in Oregon has located more nest trees and/or reproducing owls (verified by presence of young owls) than any other agency in Oregon or Washington. During one three-year period the spotted owl nest sites/young located by BLM biologists formed the baseline data for a research project being conducted by Oregon State University on the

Dispersal of Juvenile Northern Spotted Owls in the Pacific Northwest Douglas-fir Region. (Miller, 1985). The nest sites/young located by BLM were crucial to the success of this research as few to no nests were located in the region on other forest land ownerships. Between 1985 and 1987 BLM located 168 nest sites for young (indicating nesting success) on BLM lands (Exhibit A). Medford District biologists located 24 percent of these nest sites during the three-year period (Exhibit B). BLM has also collected actual habitat use data on 55 spotted owl sites during the last 5 years through the use of radio telemetry techniques. It is well documented that radio tracking is an expensive and labor intensive procedure. Habitat use data collected through radio tracking of spotted owls provides BLM managers the baseline inventory data required to assure that knowledgeable decisions can be made for spotted owl management.

Of the 289 spotted owl sites analyzed in the Spotted Owl Environmental Assessment (EA) nest sites have been documented on 108 sites and "centers of activity" or "core areas" have been identified on 146 sites. This illustrates that BLM has a high level of basic data on 87 percent of these spotted owl sites. It is my biological opinion that the knowledge of a specific "core area" or "center of activity" is of more importance for management of an owl site than the exact nest site location because new nest sites may be used each year. Collecting reproductive data on the northern spotted owls is not a low priority monitoring assignment. As stated above, occupancy and reproductive surveys are conducted numerous times at each spotted owl site. However, due to the heavy monitoring workload first priority is

given to monitoring spotted owl sites included in the BLM/ODFW agreement.

It should be noted here that actual location of a nest site is not required to document reproductive success. On many occasions young owl[s] are located by the field surveyors during one of the seven occupancy or reproduction surveys (visits) thus no attempt is made to locate a specific nest site because usually new nest sites are used annually by spotted owls.

Besides the habitat use data that is being collected through use of radio telemetry techniques, BLM biologists are also banding spotted owls with U.S. Fish and Wildlife Service leg bands and colored leg bands. Between 1983 and 1987 BLM has banded 576 spotted owls (373 adults, 36 subadults, and 167 Juveniles) in Oregon.

Data being collected through the banding program is beginning to add to the site specific knowledge and general biology of spotted owls on BLM lands. Data collected includes but is not limited to the following: spotted owl movements within a habitat site; site fidelity; life span; etc. This banding effort is a normal part of BLM's mid-level spotted owl monitoring program. No other agency has expended a similar level of effort at the field operations level (excluding Forest Service Research).

(c) Recently, BLM analyzed the relationship between reproducing pairs of spotted owls and the acreages of old-growth forest habitat available at the site. All spotted owl sites that produced young during the last three years (1985-1987) were included in the sample. A total of 131 reproducing sites were

> identified. The results of this analysis documented spotted owl reproduction in habitat sites where the amount of old-growth forest ranged from zero (0) to 6,500 acres. The median acreage of old-growth at these owl sites is 1,600 and the mode is zero (0). Out of the 131 sites where spotted owl reproduction occurred during the last three years, 81 sites or 62 percent of the sites contained less than 2,200 acres of old-growth forest and 64 sites or 49 percent contained less than 1,000 acres of old growth (Exhibit C).

The testimony of Dr. Mark Boyce, a professor of zoology and physiology at the University of Wyoming in Laramie, was submitted by defendant-intervenor Northwest Forest Resources Council. Dr. Boyce testified that Dr. Orians' declaration regarding the effects of habitat fragmentation is incomplete and therefore misleading. Dr. Boyce stated:

> While Dr. Orians states that "the best analyses of the spotted owl's viability have shown that as habitat declines, due to fragmentation, the owl's population finds it increasingly difficult to replenish itself," he fails to explain that he is describing the results of assumptions build into mathematical models. While he cites to results of fragmentation which are said to create problems in replenishment of the owl population, such as high juvenile mortality, increased difficulty in finding vacant breeding territory and increased energy expenditures, he fails to observe that these factors are merely hypothesized in the models as consequences of fragmentation. To my knowledge, there is no empirical data in existence to establish that any of these factors actually occurs as a result of increased fragmentation of habitat for the spotted owl or any other avian species.

Dr. Boyce testified that whether or not logging a particular tract of land fragments habitat depends upon the spatial relationship of that tract of land to other existing habitat. He states that it cannot automatically be said that all logging of avian habitat fragments that habitat. Dr. Boyce asserts that none of the mathematical viability models which have been developed for the spotted owl to date has sufficient statistical reliability to justify its use as the basis of a major management decision.

Dr. Boyce opined that demographic procedures do not hold much promise for viability analysis in general, especially for long-lived species such as the spotted owl. Dr. Boyce states that for many species, such as the spotted owl, adequate sample sizes cannot be obtained to calculate statistically-reliable demographic projections, and empirical data remain a better source of information for major wildlife management decisions than the viability models for the spotted owl which have been developed to date.

APPLICABLE STANDARD

Summary judgment should be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on the file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R. Civ.P. 56(c). The burden to establish the absence of a material issue of fact for trial is on the moving party. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir.1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979). This

burden "may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *Celetox Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The burden shifts to the nonmoving party to "go beyond the pleadings and- . . . designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324, 106 S.Ct. at 2553.

Summary judgment may be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S.Ct. at 2552. All inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). When different ultimate inferences can be reached, summary judgment is not appropriate. *Sankovich v. Life Ins. Co. of N.Am.*, 638 F.2d 136 (9th Cir.1981).

The intervenors in this case argue that discovery is required before the court rules on the Portland Audubon Society's motion for summary judgment. The discovery that intervenors say is required goes to the probable accuracy of Dr. Lande's 1985 article. The court has not relied upon this document in any material way. The court has relied primarily upon reports from the BLM, to which no discovery requests have been directed. The interests of justice weigh heavily in favor of expeditious resolution of this case.

ANALYSIS

Administrative Procedures Act (APA) Review

The BLM argues that all four claims of the Portland Audubon Society are challenges to the adequacy of the Timber Management Plans and the Environmental Impact Statements which were issued between 1979 and 1983, and that these challenges are barred by 1) laches, 2) the failure of the Portland Audubon Society to exhaust administrative remedies, and 3) principles of primary administrative jurisdiction. The Portland Audubon Society in turn explains that it is challenging the decision of April 10, 1987 of the BLM not to prepare a supplemental Environmental Impact Statement, and that it is not challenging the Timber Management Plans and Environmental Impact Statements issued between 1979 and 1983. The Portland Audubon Society relies upon the provisions of the APA to support its contention that judicial review of the BLM's decision of April 10, 1987 not to prepare a supplemental Environmental Impact Statement is appropriate.

The relevant sections of the APA provide as follows:

§ 702. Right of review

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief

therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702 (1977) (emphasis in original).

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . . .

(D) without observance of procedure required by law.

5 U.S.C. § 706 (1977).

To the extent that the causes of action stated in the Portland Audubon Society's complaint seek to challenge the BLM's decision of April 10, 1987 not to prepare a supplemental Environmental Impact Statement, the court finds that that decision is a final decision within the meaning of the APA and judicial review of that decision is not barred by laches, failure to exhaust administrative remedies, or principles of primary administrative jurisdiction.

However, the Portland Audubon Society's claims under the Oregon & California Lands Act (OCLA), the Federal Lands Policy and Management Act (FLPMA), and the Migratory Bird Treaty Act (MBTA) present a different situation. The Portland Audubon Society's second claim for relief under the OCLA and the third claim for relief under FLPMA challenge the decision of the director of the BLM in 1983 to adopt a Forest Resources Policy Statement requiring that all lands suitable for timber production be managed for timber and wood product production, to the extent possible under the requirements of law. The Portland Audubon Society contends that this policy violates the multiple use mandates of both the OCLA and the FLPMA. In the fourth claim for relief under the MBTA, the Portland Audubon Society asserts that the predictions of the demise of the spotted owl made in the Environmental Impact Statements issued between 1979 and 1983 form the basis for a violation of the MBTA's prohibition against the killing or taking of birds.

The court finds that these claims are not directed to the BLM's decision of April 10, 1987 not to prepare a supplemental Environmental Impact Statement, but are challenges to the Timber Management Plans and the Environmental Impact Statements issued between 1979 and 1983. Those Timber Management Plans and Environmental Impact Statements were prepared for the ten-year period from 1980 until 1990, with new plans to go into effect in October 1990. Two of those Timber Management Plans were challenged by the Portland Audubon Society shortly after they were issued, but these challenges were not pursued on appeal. Challenges under OCLA, FLPMA and the MBTA were never presented to or ruled upon by the BLM.

The court finds that the APA does not provide a basis for a challenge by the Portland Audubon Society to administrative decisions made over five years ago and upon which the BLM has operated without objection. I sum, since the Portland Audubon Society failed to pursue its claims under OCLA, FLPMA and the MBTA in a timely manner, they are not subject to this court's review under the APA.

Merits of the NEPA Claim

The remaining claim which is subject to review by this court under the APA is the BLM's decision not to prepare a supplemental Environmental Impact Statement. The purpose of an Environmental Impact Statement is two-fold: 1) to provide decisionmakers with enough

information to assist them in deciding whether to proceed with the proposed project in light of its environmental consequences; and 2) to provide the public with information about the proposed project and with an opportunity to participate in gathering and presenting information to decisionmakers.

In *Marsh v. Oregon Natural Resources Council*, ___ U.S. ___, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989), the United States Supreme Court addressed the continuing duty of an agency to review new information. The court explained:

> The parties are in essential agreement concerning the standard that governs an agency's decision whether to prepare a supplemental EIS. They agree that an agency should apply a "rule of reason," and the cases they cite in support of this standard explicate this rule in the same basic terms. These cases make clear that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made. On the other hand, and as the Government concedes, NEPA does require that agencies take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval. . . . Application of the "rule of reason" thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains "major Federal actio[n]" to occur, and if the new information is sufficient to show that the

> remaining action will "affec[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." Cf. 42 U.S.C. § 4332(C).

___ U.S. at ___, 109 S.Ct. at 1859 (footnotes omitted).

The Supreme Court concluded that unless an agency's decision not to supplement an Environmental Impact Statement is arbitrary and capricious, it should not be set aside. A trial court should give deference to agency expertise when considering factual issues and matters involving the exercise of judgment. This court's review is limited to whether the decision by the BLM not to supplement the existing Environmental Impact Statement was based upon "consideration of the relevant factors and whether there has been a clear error of judgment." ___ U.S. at ___, 109 S.Ct. at 1861, quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-824, 28 L.Ed.2d 136 (1971).

The Portland Audubon Society submits new information that indicates that the spotted owl is declining in number; that this decline in number is due to forest fragmentation caused by logging its habitat, old-growth trees; and that uncertainty exists about the ability of the spotted owl to survive as a species if old-growth trees are logged as planned for 1988, 1989 and 1990.

The BLM and the intervenors argue that the new information submitted by the Portland Audubon Society is speculative in nature and is not accurate. The BLM and the intervenors argue that the submission of speculative and inaccurate information about the viability of the

spotted owl as a species does not require the BLM to supplement existing Environmental Impact Statements.

The BLM does not dispute that a possible threat of extinction to a species is of environmental significance. In its analysis of the spotted owl, documented in drafts dated May 8, 1986 and January 16, 1987, the BLM recognizes that the spotted owl population is declining at a rate between one percent and four percent per year and that the loss of old-growth trees and forest fragmentation are the major factors causing this population decline. These facts are confirmed by the new information relied upon by the Portland Audubon Society. The new information raises uncertainty as to the effects of future planned logging of old-growth trees upon the viability of the spotted owl population.

Based upon the new information that plans for old-growth logging may present uncertainty as to the survival of the spotted owl species, and in response to the concerns of environmentalists, including the Portland Audubon Society, the BLM conducted an investigation and issued a document entitled "Spotted Owl Assessment" dated February 3, 1987. This Spotted Owl Assessment is the basis for the Record of Decision of the state director of the BLM dated April 20, 1987 declining to issue a supplemental Spotted Owl Environmental Impact Statement. The decision not to issue a supplemental Spotted Owl Environmental Impact Statement was subsequently upheld by the Interior Board of Land Appeals in an opinion dated February 29, 1988.

The Environmental Impact Statements prepared between 1979 and 1983 do not address the issues of

adequate population size or the effects of habitat fragmentation upon the long-range survival of the spotted owl species. Neither does the Spotted Owl Environmental Assessment prepared in 1987. This is a significant omission from the Spotted Owl Environmental Assessment in light of the new information available at the time it was prepared.

Since the Spotted Owl Environmental Assessment does not address the critical issues of adequate population size and the effects of habitat fragmentation upon the long-range survival of the spotted owl, the court concludes that the decision of the BLM not to supplement the Environmental Impact Statements prepared between 1979 and 1983 was arbitrary and capricious in light of the new, significant, and probably accurate information that the planned logging of spotted owl habitat raises uncertainty about the ability of the spotted owl to survive as a species.

This conclusion requires the court to address once again whether the court is precluded from reviewing this action by Section 314 of the 1988 continuing budget resolution and its reenactment in September, 1988. The BLM has a continuing duty under NEPA to consider new information. This court's power to review the BLM's compliance with this duty is limited by its statutory grant of jurisdiction from the Congress. While Section 314 does not exempt timber sales from administrative challenge, it may preclude judicial review. Section 314 provides:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their

> respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: Provided, however, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the bases that the plan does not incorporate information available subsequent to the completion of the existing plan: Provided further, That any and all particular activities to be carried out under existing plans may nevertheless less be challenged.

Continuing Resolution, H.J. Res. 395, § 314, Pub.L.No. 100-202, 101 Stat. 1329-254, 133 Cong.Rec. H 12468 (daily ed. Dec. 21, 1987). (The above section was reenacted without change as H.R. 4867 and signed by the President on September 27, 1988, and is now found in Pub.L.No. 100-446).

In *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), the Court of Appeals made the following observation of Section 314:

> The section purports in one sentence to take away the jurisdiction of the district courts to hear challenges to "existing plans", while in a following sentence providing "further that any and all particular activities to be carried out under existing plans may nevertheless be challenged."

866 F.2d at 304.

In reversing the judgment of this court and remanding the matter for further proceedings, the Court of Appeals stated:

> At a trial, both sides may be able to show that owl habitat degradation was known before or after the plan was adopted. Such proof would shed light on the "new information" problem. However, that would not answer the last "provided however" clause of the section. That clause forces the decision maker to decide whether the challenge is to the plan or to particular activities. That decision must be made in the first instance by the trial court.

Id. at 307-08.

The record in the case demonstrates that the Portland Audubon Society relies solely upon "new information" in its challenge to the BLM's decision not to issue a supplemental Environmental Impact Statement. The reports and studies relied upon by the Portland Audubon Society were published after the existing Timber Management Plans and Environmental Impact Statements were completed. The information contained in the reports and studies submitted by the Portland Audubon Society was not available prior to the completion of the existing Timber Management Plans and Environmental Impact Statements.

If Section 314 prohibited challenges to an existing Timber Management Plan solely on the basis that the plan does not incorporate information which became available after the completion of the existing plan, the analysis would end here. However, as the Court of Appeals noted, this "would not answer the last 'provided however' clause of the section," 866 F.2d at 307-08.

The BLM asserts that Section 314 precludes this action because the right to judicial review of "any and all particular activities" does not apply to the action before this court. The BLM argues that the generic manner in which the Portland Audubon Society presented its factual case as well as the significant effect of the relief sought on the ability of the BLM to continue management of its lands under the existing plans requires the court to give effect to the prohibition of Section 314. The BLM points to the affidavit of its employee detailing the consequences of permanent injunctive relief on the BLM's ability to continue management of its lands under existing plans:

> 8. The initial May 18, 1988 injunction and the subsequent June 13, 1988 injunction caused a 162 million board feet shortfall below the sustained yield allowable cut level in FY 1988 BLM western Oregon timber sales. If the injunction were to be reinstated, this volume shortfall could not be made up by offering the FY 1988 enjoined tracts during FY 1989. Additionally, 38 million board feet (two tracts bid in FY 1987, but not awarded, and six tracts bid in FY 1988, but not awarded) have been blocked from award and harvest in FY 1989 by the May and June 1988 injunctions and would continue to be blocked if the June 13, 1988 injunction were to be reinstated.
>
> 9. Actual impact on western Oregon BLM timber sales offerings in Fiscal Years 1989 and 1990 would be greater than the long term reduction in annual sustained yield productive capacity. This is because there is less lead time available to revise annual harvest plans to substitute non-enjoined timber sale tracts for those enjoined from sale under the June 13, 1988 Court Order is that injunction were reinstated and continued. Physical and legal access as well

as time needed for substitute sale preplanning and environmental analysis are factors not accounted for in developing longer term sustained yield allowable cut calculations.

10. The volume of all planned FY 1989 BLM western Oregon timber sale units that would be enjoined from sale and harvest under a reinstatement of the June 13 injunction is calculated to total 396 million board feet. Substitute tracts that meet the existing forest management plans and their respective environmental impact statements total 59 million board feet. Most of these are from sale tracts that had been planned for FY 1990. Thus, timber sale offerings in FY 1989 would be 337 million board feet short of the planned allowable cut volume.

11. As a result of moving planned FY 1990 sales into FY 1989 as substitutes for enjoined tracts, if the June 13, 1988 injunction were reinstated and continued through FY 1990, this would create a reduction of 333 million board feet below the planned FY 1990 allowable cut sale plan volume.

12. A reinstatement and continuation of the June 13, 1988 injunction over the remaining two years before the implementation of the replacement plans now in development would actually drop the allowable timber sales offerings significantly below the 1.023 billion board foot level based on a simple allowable cut recalculation. FY 1989 allowable timber sale volume would drop to 839 million board feet and FY 1990 allowable timber sales volume would come to only 843 million board feet. These levels of harvest are 29 percent and 28 percent below the levels set through public land use planning the Environmental Impact Statements developed for the existing decadal timber management plans.

Corrected Fourth Affidavit of Robert E. Metzger, pp. 5-7.

In response, the Portland Audubon Society states that its challenge is a challenge to "particular activities" – i.e. to a group of site-specific sales – and therefore is allowed under Section 314.

The legislative history of the conference committee during the 1988 reenactment of Section 314 states the intent of Congress. The conference committee report states:

> The managers have agreed to language in section 314 prohibiting challenges to Forest Service and BLM land and resource management plans solely on the basis that the plan is outdated or does not incorporate new information. However, the section is not intended to preclude case-by-case timber sale appeals in site-specific instances, and ensures that judicial review of these and other particular Forest Service and BLM activities shall be available.
>
> Congress, in the exercise of its plenary authority over federal lands, has the power to limit the availability of judicial relief under substantive or procedural statutes affecting the management of those lands. While the managers do not endorse the ready use of this Constitutionally-derived power, they consider section 314 to be a necessary short term response to those challenges that have disrupted or have the potential to disrupt new management plans and timber management activities under the existing plans while the new plans are being developed. The language in section 314 has been included to ensure the smooth transition of resource management activities and planning capability from one planning period to another, especially during the last stage of management under the existing plans. The managers note that this is

> particularly applicable in the current circumstances because both the Forest Service and BLM are within approximately 18 months of the completion and release of final land and resource management plans and environmental impact statements in Oregon and Washington.

H.R.Cong.Rep 862, 100th Cong., 2d Sess. at 76 (Aug. 10, 1988).

In deciding how to apply Section 314 to the timber sales at issue, this court will give meaning to the statute as a whole and avoid rendering any part of the statute inoperative or insignificant. It is a cardinal principle of statutory construction that whenever possible statutes are to be given such effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant. *Rockbridge v. Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971), citing *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962).

The first section of Section 314 states that "[t]he Forest Service and Bureau of Land Management . . . may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans." This part of Section 314 expresses the affirmative intent of Congress as stated in the legislative history of the conference committee to prevent those kinds of disruptions to existing Timber Management Plans that preclude a smooth transition from one planning period to another. Section 314 goes on to state that "[n]othing shall limit judicial review of particular activities on these lands: Provided however, That there shall be no challenges to any existing plan . . . in the case of the Bureau of Land Management, solely on the

basis that the plan does not incorporate information available subsequent to the completion of the existing plan." This portion of Section 314 allows judicial review of "particular activities" on BLM lands, but specifically precludes the court from reviewing challenges to timber sales made under Timber Management Plans on the basis that the Timber Management Plans do not incorporate information which became available after the completion of the Timber Management Plans.

This action is a challenge to timber sales made under Timber Management Plans adopted between 1979 and 1983 based solely upon the fact that these Timber Management Plans do not incorporate new information about spotted owls. As such, the challenge made in this case falls squarely and unambiguously within the group of challenges that Congress intended to preclude from judicial review.

The most difficult issue faced by this court is the proper application of the last portion of Section 314, which states: "Provided further, That any and all particular activities to be carried out under existing plans may nevertheless be challenged."

In the most recent enactment of Section 314, the conference committee report explains that this section "is not intended to preclude case-by-case timber sale appeals in site-specific instances, and ensures that judicial review of these and other particular Forest Service and BLM activities shall be available." This legislative history is consistent with a reasonable interpretation of Section 314 as a whole. Section 314 allows the BLM to operate under the Timber Management Plans adopted between 1979 and

1983 pending the completion of new Timber Management Plans in 1990 without judicial challenges to existing Timber Management Plans based upon claims that new information requires different action. In short, Section 314 prohibits a judicial challenge to existing Timber Management Plans, but allows a judicial challenge to particular BLM activities on a case-by-case, site-specific basis.

In this case, the Portland Audubon Society challenges the decisions made by the BLM in various Timber Management Plans to log old-growth timber based upon a claim that the Timber Management Plans do not incorporate information *now* available regarding the effects of old-growth logging on the spotted owl species. The challenge in this case is based upon a body of scientific research relating to the spotted owl species which has been developed since the adoption of the Timber Management Plans. The Portland Audubon Society presents no new information which is site-specific to any proposed timber sale activity. The Portland Audubon Society seeks judicial review of its challenge to the decisions made by the executive branch of government in existing Timber Management Plans. It does not seek judicial review of an activity of the BLM based on site-specific new information, such as the discovery of a bald eagle nest or an archeological "find" or a blow down of timber on a particular sale location. The Portland Audubon Society's challenge cannot reasonably be characterized as a challenge to "particular activity" for which judicial review is available under Section 314. If "particular activity" were meant to be so broad as to include the Portland Audubon Society's challenge, the statute's intent that the BLM continue under existing Timber Management Plans until new

plans were completed would have no meaning. Under the facts of this case, Section 314 precludes judicial review because this case is based solely upon the claim that the Timber Management Plans do not incorporate new information available subsequent to the adoption of the plans. The facts of this case preclude it from being deemed a challenge to a "particular activity" of the BLM.

The Portland Audubon Society's renewed motion for summary judgment (#149) is denied. The BLM's motion for summary injunction (#161) is granted. The preliminary injunction shall be vacated and judgment entered for the BLM. The BLM should prepare the appropriate documents.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUDUBON SOCIETY, CENTRAL OREGON AUDUBON SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, Plaintiffs, v. DONALD HODEL, in his official capacity as Secretary, United States Department of Interior, Defendant. and NORTHWEST FOREST RESOURCE COUNCIL, HUFFMAN & WRIGHT LOGGING CO., FRERES LUMBER CO., INC., LONE ROCK TIMBER CO., INC., SCOTT TIMBER CO., CLEAR LUMBER MANUFACTURING CORP., YONCALLA TIMBER PRODUCTS, INC., CORNETT LUMBER COMPANY, INC., THE ASSOCIATION OF O & C COUNTIES and BENTON COUNTY, Defendants-Intervenors	Civil No. 87-1160-FR ORDER (Filed April 20, 1988)

FRYE, Judge:

IT IS HEREBY ORDERED that the motion of defendant, Donald Hodel, Secretary of the United States Department of Interior, to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and (6) on the grounds that the court lacks subject matter jurisdiction and the plaintiffs have failed to state a claim for which relief can be granted is GRANTED.

DATED this 20 day of April, 1988.

/s/ Helen J. Frye
Helen J. Frye
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUDUBON SOCIETY, CENTRAL OREGON AUDUBON SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL,

Plaintiffs,

v.

DONALD HODEL, in his official capacity as Secretary, United States Department of Interior,

Defendant.

and

NORTHWEST FOREST RESOURCE COUNCIL, HUFFMAN & WRIGHT LOGGING CO., FRERES LUMBER CO., INC., LONE ROCK TIMBER CO., INC., SCOTT TIMBER CO., CLEAR LUMBER MANUFACTURING CORP., YONCALLA TIMBER PRODUCTS, INC., CORNETT LUMBER COMPANY, INC., THE ASSOCIATION OF O & C COUNTIES and BENTON COUNTY,

Defendants-Intervenors

Civil No. 87-1160-FR

OPINION

(Filed April 20, 1988)

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FRYE, Judge:

In the matter before the court, the defendant, Donald Hodel, Secretary of the United States Department of Interior, moves the court for an order dismissing this action pursuant to Fed. R. Civ. P. 12(b)(1) and (6) on the grounds that the court lacks subject matter jurisdiction and the plaintiffs have failed to state a claim for which relief can be granted.

BACKGROUND

This is an action for declaratory and injunctive relief. Plaintiffs, Portland Audubon Society, Headwaters, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council, are environmental organizations who are challenging the decision of the

Oregon Director of the Bureau of Land Management (BLM) to sell for harvesting certain old-growth timber located on BLM lands in the State of Oregon. Old-growth timber is the natural habitat of the northern spotted owl. Defendant, Donald Hodel, Secretary of the United States Department of Interior, is sued in his official capacity. Defendant-Intervenors have economic interests in the outcome of this case.

Plaintiffs allege violations of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, the Oregon & California Lands Act, 43 U.S.C. § 1181, the Federal Lands Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.*, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 *et seq.*, and the Administrative Procedures Act (APA), 5 U.S.C. §§ 553 *et seq.*

Plaintiffs seek an order directing Secretary Hodel to halt timber sales from those timber stands which are older than 200 years and which lie within a 2.1 mile radius of the known habitats of the northern spotted owl, including 289 sites identified on maps prepared by the BLM for analysis in the preparation of the Spotted Owl Environmental Assessment. Plaintiffs request that the proposed order remain in effect until the BLM prepares a supplemental Environmental Impact Statement which discloses the projected effects of the destruction of old-growth forests on populations of the northern spotted owl and until Secretary Hodel complies with the Migratory Bird Treaty Act.

FACTUAL ALLEGATIONS OF THE COMPLAINT

Old-growth forest ecosystems are unique ecosystems. An old-growth forest ecosystem takes at least 200 years to

develop. Much of the past and on-going research regarding old-growth forest ecosystems has focused upon the northern spotted owl. The northern spotted owl is regarded by biologists as a "management indicator species" since its fate is presumed to be an indication of the fates of all species which inhabit old-growth forest ecosystems.

Between 1979 and 1983, Secretary Hodel formulated Timber Management Plans (TMP's) for each decade for each of the seven districts of the Department of Interior located in western Oregon. These TMP's were accompanied by seven separate Environmental Impact Statements (EIS's). The information reviewed by the BLM in preparing these EIS's indicates that the logging of old-growth forests will result in a decline in the number of northern spotted owl inhabiting those old-growth forests.

In March, 1983, Secretary Hodel adopted a Forest Resources Policy Statement, which sets out policies for the management of forest resources of BLM lands affected by the Oregon and California Lands Act, 43 U.S.C. § 1181.

The Forest Resources Policy Statement requires that all lands classified as suitable for timber production will be managed for timber and wood product production to the maximum extent possible under the law. Land suitable for timber production can be used for purposes other than timber production only if those other uses are specifically set forth in the Oregon and California Lands Act. Because Secretary Hodel has interpreted the Oregon and California Lands as not including the protection of wildlife or habitat, except as required by the Endangered

Species Act, the Forest Resources Policy Statement prohibits the withdrawal of lands classified as suitable for timber production to protect wildlife or habitat not specifically listed under the Endangered Species Act.

A number of scientific studies have been released since the time that the BLM completed the EIS's for the seven districts of the Department of the Interior located in western Oregon. These studies include: 1) a status review of the northern spotted owl by the United States Fish and Wildlife Service (1982); 2) a draft supplemental EIS prepared by the United States Forest Service analyzing the habitat requirements of the northern spotted owl (1986); 3) a study of the northern spotted owl undertaken by a "blue ribbon" panel of respected scientists for the National Audubon Society (1986); 4) an analysis of the population demographics of the northern spotted owl by Dr. Russell Lande (1985 and 1987); and 5) an analysis of the northern spotted owl prepared by a team of biologists from the Department of Interior (May 8, 1986 and January 16, 1987). In addition to these studies, other research projects have generated significant new information concerning the northern spotted owl.

Assistant Secretary of Agriculture, Douglas MacCleery, has ordered the United States Forest Service to prepare a supplemental EIS on the effects of the destruction of old-growth timber on the northern spotted owl. MacCleery's decision to order a supplemental EIS is based on the fact that significant new information has been developed on the northern spotted owl since the Forest Service released its original EIS on June 14, 1984. This new information includes the information provided by Dr. Russell Lande.

On February 3, 1987, the Oregon State Director of the BLM issued a Spotted Owl Environmental Assessment, which purports to review the significance of the new information concerning the habitat requirements of the northern spotted owl. The Spotted Owl Environmental Assessment, however, does not analyze or discuss any of the new information contained in the many studies of the northern spotted owl that have been released since the completion of the seven original EIS's.

On April 10, 1987, the Oregon State Director of the BLM decided to continue logging old-growth timber as proposed in the original Timber Management Plan. The Director of the BLM decided not to supplement the seven original EIS's because he deemed "not significant" the new information regarding the effects of logging old-growth timber on the northern spotted owl. As a result, old-growth timber on BLM lands in western Oregon will be logged at a rate that will foreclose Secretary Hodel's ability to provide meaningful protection for the northern spotted owl and other old-growth dependent species. New resource management plans scheduled for 1990 will be too late to stop the irreversible effects of current old-growth forest destruction.

On June 10, 1987, plaintiffs appealed the decision of the Oregon State Director of the BLM to the Interior Board of Land Appeals requesting an immediate stay of all sales of timber from stands older than 200 years within a 2.1 mile radius of each of the 289 known northern spotted owl habitat sites analyzed in the Spotted Owl Environmental Assessment. On July 1, 1987, the Interior Board of Land Appeals denied the plaintiffs' request for a stay. The Interior Board of Land Appeals based its denial

solely on the ground that plaintiffs had failed to show a substantial threat of irreparable injury to the northern spotted owl because the record before it was silent as to any specific proposed timber sale that would affect the habitat of the northern spotted owl.

On September 4, 1987, plaintiffs filed a renewed request for a stay with the Interior Board of Land Appeals. Plaintiffs attached a list of all old-growth sales located within a 2.1 mile radius of the known habitat sites of the northern spotted owl and the Secretary Hodel had scheduled to offer for sale in the next three years. In addition, plaintiffs requested a stay of all planning for timber sales, including site selection and the initiation of environmental assessments, for old-growth stands as described above, unless Secretary Hodel first prepared and EIS with respect to each sale. Due to the immediate and irreparable effects of defendants' proposed sales on the old-growth ecosystems, and therefore on the northern spotted owl, plaintiffs advised the Interior Board of Land Appeals that they would view the Interior Board of Land Appeals' failure to act within twenty days on the renewed request for a stay as a denial of their request. As of the date of the filing of this case, twenty days have expired, and the Interior Board of Land Appeals has failed to act on plaintiffs' renewed request for a stay.

In 1982, the United States Fish and Wildlife Service refused to consider the northern spotted owl for placement on the endangered species list. On July 24, 1987, the United States Fish and Wildlife Service decided to formally consider the northern spotted owl for placement on the endangered species list. The change in the position of the United States Fish and Wildlife Service was based in

part on the significant new information that plaintiffs have urged Secretary Hodel to consider. The decision of the United States Fish and Wildlife Service is significant "new information".

The Migratory Bird Treaty Act, 16 U.S.C. §§ 703 *et seq.*, prohibits the killing of any migratory bird by any means or in any manner, unless within the authority and to serve the purposes of the Migratory Bird Treaty Act. The northern spotted owl is a migratory bird protected by the Migratory Bird Treaty Act. The Migratory Bird Treaty Act gives effect to the goals of treaties between the United States and Great Britain (on behalf of Canada), Mexico and Japan. Logging of old-growth forests kills the northern spotted owl by destroying its habitat. Such logging is a major cause of the decline in the population of the northern spotted owl and is likely to lead to the ultimate extinction of the northern spotted owl.

CLAIMS OF THE PLAINTIFFS

On October 19, 1987, plaintiffs filed this action alleging four claims for relief. These claims are:

1. the destruction of old-growth forests constitutes major federal action which detrimentally affects the quality of the human environment in violation of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321;

2. defendants' Forest Resource Policy Statement precludes Secretary Hodel from withdrawing lands otherwise suitable for commercial logging in order to protect the habitat of the northern spotted owl in violation of the O & C Lands Act, 43 U.S.C. § 1181(a);

3. defendants' Forest Resources Policy Statement violates the multiple use mandate of the Federal Lands Policy and Management Act, 43 U.S.C. § 1701; and

4. destruction of old growth forests kills the northern spotted owl in violation of the Migratory Bird Treaty Act, 16 U.S.C. § 703.

CONTENTIONS OF THE DEFENDANTS

Secretary Hodel asks the court to dismiss this action on the following grounds:

1. plaintiffs are barred by laches from maintaining this action and are barred by the doctrine of collateral estoppel from challenging the Timber Management Plans of the Forest Service Districts of Roseburg, Eugene and Coos Bay;

2. this action is premature is that the land management policies of the BLM are not ripe for review, and the doctrine of administrative jurisdiction requires dismissal of plaintiffs' complaint;

3. plaintiffs have not exhausted their administrative remedies;

4. this court is not empowered to determine plaintiffs' claims under the regulations of the Council of Environmental Quality;

5. there is no private right of action to enforce the Migratory Bird Treaty Act; and

6. a congressional continuing budget resolution forecloses judicial review of plaintiffs' claims.

STANDARD OF REVIEW

In ruling on this motion to dismiss pursuant to Fed. R. Civ. P. 12, the court will assume that the allegations of the complaint are true and therefore will construe the allegations of the complaint in the light most favorable to the plaintiffs. As a general rule, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The purpose of a motion to dismiss is to test the legal sufficiency of a plaintiff's complaint, assuming the facts as alleged therein to be true.[1]

ANALYSIS

The court must first address Secretary Hodel's argument that judicial review of plaintiffs' claim has been barred by the enactment of section 314 of Continuing Resolution, H.J. Res. 395, which provides:

> SEC. 314. The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue

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[1] The defendant has submitted a large number of exhibits and affidavits. The court will not treat plaintiffs' motion to dismiss as a motion for summary judgment. The court will base its decision upon the motion to dismiss only on the facts as alleged in the complaint.

> the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: Provided, however, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: Provided further, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

133 Cong. Rec. H12468 (daily ed. Dec. 21, 1987).

Secretary Hodel argues that section 314 expressly revokes this court's jurisdiction to resolve plaintiffs' alleged grievance. Secretary Hodel argues that the goal of plaintiffs' lawsuit is to prevent the BLM from managing timber resources under existing Timber Management Plans because the existing Timber Management Plans do not incorporate information made available subsequent to the adoption of the plans relating to the northern spotted owl and other old-growth dependent species. Secretary Hodel argues that section 314 of Continuing Resolution, H.J. Res. 395, was enacted at the behest of Senator Mark O. Hatfield to prevent this very lawsuit.

Secretary Hodel argues that not only is section 314 unambiguous on its face, but also the Senate Committee Report on the Department of the Interior and Related Agencies Appropriation Bill, 1988 (S. Rep. No. 100-165, September 22, 1987) persuasively states the intention of Congress in enacting section 314 as follows:

> The Committee understands that the current land management planning process in the Forest

Service and BLM is proceeding on a forest-by-forest and district-by-district basis. The purpose of these new plans are to align resource management activities with the most recent Federal environmental standards, procedures, and requirements. The Committee is concerned, however, by efforts to disrupt the development of new management plans, most notably sound timber management activities, through appeals of timber sales and threats of litigation. It was not the intent of Congress in passing NEPA, NFMA and FLPMA to create a schism in the smooth transition of resource management activities from one planned period to another. Instead, the resource management planning process is intended to be a dynamic process which allows for the periodic consideration and integration of new resource information from one planning cycle to another without the interruption of management activities of any single resource. Except in rare instances, this cyclical planning process obviates the need to supplement existing EIS's, particularly toward the end of one planning cycle, when a new plan is being prepared. *However, the precipitous increase in timber sales appeals and threats of litigation, especially on BLM lands in western Oregon, are designed to bring to a halt entire timber sales creating just such a division in planning cycles.* The effect of these actions is to hinder the agency's ability to prepare and implement new plans, and may create unacceptable economic dislocations in timber-dependent communities. *The Committee has, therefore, included bill language intended to prevent the existing management plans from being enjoined in their entirety, solely on the basis that they are outdated, and allow activities to continue under existing plans pending the completion of new plans.*

Id. pp. 11-12 (emphasis added).

Secretary Hodel asserts that the threats of litigation referred to in the above-quoted Senate Report specifically include this action which plaintiffs had threatened to file within twenty days if the Interior Board of Land Appeals did not grant their renewed request for stay filed on September 4, 1987. Secretary Hodel argues that it was the express intention of Congress to repeal judicial review as it relates to the challenge by plaintiffs in this case.

Plaintiffs argue that the language of section 314 does not apply to this case. Plaintiffs explain that section 314 limits judicial review of challenges to existing land management plans in their entirely, and that this action is not a challenge to existing land management plans in their entirety. In addition, plaintiffs assert that section 314 allows challenges to Timber Management Plans if the concerns raised by newly obtained information are substantive in nature. Plaintiffs point to the conference committee report, which explains the conference committee's changes to the Senate version which states that "existing plans may not be challenged solely on the basis that the plans are outdated or that there is new information, unless the claim includes information as to substantive concerns related to the new information."

Plaintiffs next argue that section 314 cannot repeal by implication the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.* Plaintiffs contend that section 314 can only be reconciled with the APA by limiting the application of section 314 to challenges to entire management plans, and then only with respect to non-substantive concerns. Plaintiffs assert that the failure of section 314 to specifically refer to the

APA supports their position that Congress did not intend to repeal its provisions.

In this lawsuit, plaintiffs challenge the April 10, 1987 decision of the Oregon Director of the BLM not to consider new information regarding the effects of the cutting of old-growth timber on the northern spotted owl by preparing supplemental EIS's. Plaintiffs ask the court to enjoin the BLM from all future old-growth timber sales within a 2.1 mile radius of known northern spotted owl habitat sites unless and until supplemental EIS's are prepared. This action challenges each of the Timber Management Plans for the seven districts of the Department of the Interior located in western Oregon on the sole basis that new information concerning the northern spotted owl has been released since the time the BLM completed the seven EIS's for these seven districts. (Plaintiffs' Complaint, para. 11). Plaintiffs do not challenge individual timber sales. Plaintiffs' action challenges the continuing validity of the Timber Management Plans and the existing EIS's resulting in the disruption of the ongoing management process until supplemental EIS's are completed. The decision record from which plaintiffs appeal to this court concludes as follows:

> [It] would not be appropriate nor serve any worth-while purpose to supplement any of the seven timber management EISs to further address this issue, and that implementation of the current BLM land-use plans (management framework plans) and timber management plans should continue until the new land-use plans (resource management plans) currently in preparation are completed.

(Plaintiffs' Complaint, Ex. E, p. 103).

As stated above, section 314 provides, in relevant part, that:

> the Bureau of Land Management . . . may continue the management of lands within [its] jurisdiction under existing land and resource management plans pending the completion of new plans . . . [and] That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or . . . does not incorporate information available subsequent to the completion of the existing plan. . . .

Plaintiffs allege in their complaint that the Timber Management Plans are outdated as they relate to the treatment of the northern spotted owl. Plaintiffs base this allegation solely upon new information which has become available since the completion of the existing Timber Management Plans. Plaintiffs' complaint in this case contains the precise challenge that Congress intended to limit in section 314. The court concludes that Congress intended to prohibit judicial review of challenges to existing Timber Management Plans on the basis that they do not incorporate information which has become available after the adoption of the existing Timber Management Plans.

Plaintiffs' assertion that judicial review under the APA cannot be repealed by implication is without merit. Section 314 expressly limits judicial review under the circumstances presented in this case. The fact that Congress did not make a citation to the APA in limiting the review allowable does not change Congress' stated intent to limit all judicial review except as noted whether it be pursuant to the APA or another statute. Judicial review

under the APA is subject to the structure of the statutory scheme under which relief is requested. In *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), the Court explained:

> The APA confers a general cause of action upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, but withdraws that cause of action to the extent the relevant statute "preclude[s] judicial review," 5 U.S.C. § 701(a)(1). Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved. Therefore, we must examine this statutory scheme "to determine whether Congress precluded all judicial review, and, if not, whether Congress nevertheless foreclosed review to the class to which the [respondents] belon[g]." *Barlow v. Collins*, 397 U.S. 159, 173, 90 S.Ct. 832, 841, 25 L.Ed.2d 192 (1970) (opinion of BRENNAN, J.,). . . .

Id. at 345-46 (citations omitted).

Plaintiffs' assertion that judicial review is not precluded as to substantive concerns by section 314 is without merit. While the conference committee report uses this language, nothing in the express language of section 314 supports plaintiffs' position that this is the proper interpretation of section 314.

Congress has the power to limit the availability of judicial relief under NEPA, the Federal Lands Policy

Management Act, the O & C Lands Act, and the Migratory Bird Treaty Act. The finding by the court that Congress has done so in enacting section 314 means that plaintiffs are not entitled to the relief requested in their complaint. Section 314 operates to preclude plaintiffs' entire action.

Defendant's motion to dismiss is granted.

DATED this 20 day of April, 1988.

/s/ Helen J. Frye
Helen J. Frye
United States District Judge

APPENDIX E

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUDUBON SOCIETY, CENTRAL OREGON AUDUBON SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, Plaintiffs, v. DONALD HODEL, in his official capacity as Secretary, United States Department of Interior Defendant.	Civil No. 87-1160-FR COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTORY STATEMENT

1. This is an action for declaratory and injunctive relief. Plaintiffs challenge the decision of the Oregon Director of the Bureau of Land Management (BLM) to sell old-growth timber necessary for habitat for the northern spotted owl (strix occidentalis caurina) from BLM lands in the State of Oregon.

2. The action arises under and alleges violations of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, the Oregon & California Lands Act (OCLA),

43 U.S.C. § 1181, the Federal Lands Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.*, the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 *et seq.*, and the Administrative Procedures Act (APA), 5 U.S.C. § 553 *et seq.*

3. Plaintiffs seek an order directing the defendant to halt imminent timber sales from stands older than 200 years within a 2.1 mile radius circle of known spotted owl habitat sites, including 289 sites identified on maps prepared by the BLM for analysis in the Spotted Owl Environmental Assessment (SOEA). Plaintiffs request that the proposed order remain in effect until the defendant prepares a supplementary Environmental Impact Statement (SEIS) which discloses the effects of defendant's destruction of old growth forests on spotted owl populations, and until the defendant complies with the Migratory Bird Treaty Act. Such an order is necessary to preserve the status quo, to prevent illegal agency action, and to forestall irreparable injury to the environment.

II. JURISDICTION AND VENUE

4. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question jurisdiction).

5. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e).

III. PARTIES

6. The plaintiffs in this action are:

A. Headwaters, a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. Headwaters' members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

B. Land County Audubon Society (LCAS), a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. LCAS's members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

C. The Oregon Natural Resources Council (ONRC), a registered Oregon non-profit corporation dedicated to protecting and conversing Oregon's wildlife, lands, waters and natural resources. ONRC and its members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be

significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

D. The Wilderness Society (TWS), a national conservation organization. TWS devotes its resources to the preservation and proper management of America's public lands. Founded in 1935, TWS is a nonprofit organization with 170,000 members. TWS has its national headquarters in Washington, D.C., and eight regional offices – in Boston, Atlanta, Denver, Phoenix, Boise, San Francisco, Seattle and Anchorage. In each region, TWS staff members organize local citizens and conversation groups to assist government officials in making land use policy decisions. The Society also monitors federal actions affecting public land management, and staff members present information to federal agencies and Congress on a wide range of land preservation issues. TWS members reside near BLM lands in Oregon, California and Washington State, and use and recreate on such lands. TWS' and its members' use and enjoyment of such lands and owl populations occurring on such lands will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

E. The Sierra Club, Inc., a non-profit corporation organized under the laws of the State of California. The Club's principle place of business is in San Francisco, California, and other offices located throughout the nation. The Club is a national conversation organization with over 400,000 members dedicated to protecting natural resources and the environment, including old-growth forests. The Club and its members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, aesthetic enjoyment, and other recreational

activity. Their use and enjoyment of old-growth forests on BLM lands will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

F. Siskiyou Audubon Society, a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. Siskiyou Audubon Society and its members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

G. Central Oregon Audobon Society, a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. Central Oregon Audubon Society and its members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

H. Portland Audubon Society, a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. Portland Audubon Society and its members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic

enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

I. Salem Audubon Society, a non-profit organization incorporated in the State of Oregon. Salem Audubon Society and its members have a common interest in and a concern for birds and wildlife and the quality of the environment of the State of Oregon. Salem Audubon Society and its members use, live near, and recreate on BLM administered lands. They maintained an active interest in the preservation of Oregon's old-growth ecological system in general, the well-being of species dependent on such forest systems, and the state's populations of raptorial birds, including the northern spotted owl. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

J. Umpqua Valley Audubon Society, a non-profit organization incorporated in the State of Oregon. Umpqua Valley Audubon Society and its members have a common interest in and a concern for birds and wildlife and the quality of the environment of the State of Oregon. Umpqua Valley Audubon Society and its members use, live near, and recreate on BLM administered lands. They maintain an active interest in the preservation of Oregon's old-growth ecological system in general, the well-being of species dependent on such forest systems, and the state's populations of raptiorial birds, including the

northern spotted owl. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

K. Kalmiopsis Audubon Society, a non-profit organization incorporated in the State of Oregon. The Kalmiopsis Audubon Society and its members have a common interest in and a concern for birds and wildlife and the quality of the environment of the State of Oregon. Kalmiopsis Audubon Society and its members use, live near and recreate on BLM administered lands. They maintain an active interest in the preservation of Oregon's old-growth ecological system in general, the well-being of species dependent of such forest systems, and the state's populations of raptorial birds, including the northern spotted owl. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth timber in suitable spotted owl habitat.

L. The Natural Resources Defense Council (NRDC), a national, non-profit organization dedicated to protecting and preserving the natural environment. NRDC has 55,729 members nationwide, including 1,015 members in Oregon. NRDC's members use and enjoy BLM old-growth lands for many purposes, including hiking and nature observation. Their use of these areas and enjoyment of northern spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

7. The defendant in this action is the United States Secretary of the Interior, Donald Hodel. He is sued here

in his official capacity as head of the agency whose actions are challenged. The Bureau of Land Management is an agency within the Department of the Interior.

IV. STATEMENT OF FACTS

8. Old-growth forests are distinctive and unique ecosystems. The most notable features of such forests are the massive Douglas-fir trees, with typical diameters of two to six feet and heights of 150 to 270 feet. Other structural features of old growth ecosystems include standing dead trees and downed logs. The structural features of old-growth forests provide important wildlife habitat, a source of nutrients for streams and saprophytic fungi, and magnificent settings for recreational pursuits of all kinds. A more detailed description of the characteristics of old-growth ecosystems is included in Exhibit A, attached. Old-growth ecosystems take at least two hundred years to develop. Once cut, they are irretrievably lost for our generation, our children's generation, and their children's generation.

9. Much of the past and on-going research regarding the old-growth forest ecosystem has focused on one of its residents, the northern spotted owl. The spotted owl is regarded by biologists as a "management indicator species," and its fate is presumed to be an indication of the fate of the entire assemblage of species dependent upon old-growth forests. The concerns regarding the risks of extinction faced by the spotted owl also apply to other wildlife species which depend upon or find their optimum habitat in old-growth forests. Exhibit A, attached.

10. Between 1979 and 1983, defendant formulated decadal Timber Management Plans (TMP's), for each of its seven western Oregon districts. Those TMP's were accompanied by seven separate Environmental Impact Statements (EIS's). The limited information reviewed by the BLM in those EIS's indicated that the logging of old-growth forests would result in a decline in the number of spotted owls on defendant's lands in western Oregon. *See* Exhibit B, attached.

11. A number of scientific studies have been released since the time that BLM completed the EIS's for its seven western Oregon districts. These studies contain significant new information concerning the northern spotted owl. They include: (1) a status review of the northern spotted owl by the United States Fish and Wildlife Service (1982); (2) a draft supplemental EIS prepared by the United States Forest Service, analyzing the habitat requirements of the northern spotted owl (1986); (3) a study of the northern spotted owl undertaken by a Blue Ribbon panel of respected scientists for the National Audubon Society (1986); (4) an analysis of the population demographics of the northern spotted owl by Dr. Russell Lande (1985 and 1987); and (5) a northern spotted owl analysis prepared by a team of defendant's own biologists (May 8, 1986, and January 16, 1987). In addition to these studies, a number of other research projects have generated significant new information about the northern spotted owl.

12. On March 8, 1984, Assistant Secretary of Agriculture Douglas MacCleery ordered Region VI of the Forest Service to prepare a supplemental EIS on the effects of old-growth destruction on the northern spotted

owl. That decision was based on the fact that significant new information had been developed on the spotted owl since the Forest Service released its original EIS discussing the northern spotted owl on June 14, 1984. This new information included, *inter alia*, the information provided by Dr. Russell Lande. *See* Exhibit C, attached.

13. On February 3, 1987, the Oregon State Director of the BLM issued a spotted owl Environmental Assessment (SOEA), which purported to review the significance of new information concerning the habitat requirements of the spotted owl. The SOEA, however, did not analyze or discuss any of the new information contained in the many studies of the northern spotted owl that have been released since the completion of the district EIS's. *See* Exhibit D, attached.

14. In a Decision Notice dated April 10, 1987, the Oregon State Director of the BLM decided to continue logging old-growth forests as proposed in the original TMP's. The Director decided not to supplement the EIS's because he deemed the new information regarding the effects of logging old-growth on the spotted owl "not significant." *See* Exhibit E, attached. As a result of the Director's decision, old-growth forests on BLM lands in western Oregon will be logged at a rate that will foreclose defendant's ability to provide meaningful protection for the northern spotted owl and other old-growth dependent species. New resource management plans scheduled for 1990 will be too late to stop the irreversible effects of current old-growth forest destruction. *See* Exhibit F, attached.

15. On July 24, 1987, the United States Fish & Wildlife Service (USFWS) decided to formally consider the northern spotted owl for placement on the endangered species list. *See* Exhibit G, attached. In 1982, the USFWS had refused to consider the owl for listing. *See* Exhibit H, attached. The change in the USFWS position was based in part on the significant new information plaintiffs have urged defendant to consider, and the USFWS decision itself is significant "new information."

16. In March 1983, the defendant adopted a "Forest Resources Policy Statement" (FRPS). *See* Exhibit I, attached. The FRPS dictates defendant's management of forest resources of BLM lands affected by the Oregon and California Lands Act (OCLA), 43 U.S.C. § 1181. The FRPS requires that all lands classified as suitable for timber production shall be managed for timber and wood product production, to the maximum extent possible under the law. Suitable lands can be used for purposes other than timber production only if those other uses are specifically set forth in the OCLA. Because defendant has interpreted the OCLA as not including the protection of wildlife or habitat (except as required by the Endangered Species Act), the FRPS prohibits the withdrawal of suitable timberlands to protect wildlife or habitat not specifically listed under the Endangered Species Act.

17. The Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 *et seq.*, prohibits the killing of any migratory bird by any means or in any manner, unless under the authority and to serve the purposes of the MBTA. The MBTA effectuates the purposes of treaties between the United States and Great Britain (on behalf of Canada), Mexico and Japan, and other purposes. The northern

spotted owl is a migratory bird protected by the MBTA. *See* 50 C.F.R. § 10.13.

18. Logging of old-growth forests kills northern spotted owls by destroying their habitat. Such logging is a major cause of the decline of the northern spotted owl population and is likely to lead to the ultimate extinction of the species. *See* Exhibits F, J, and K, attached.

V. ADMINISTRATIVE PROCEEDINGS

19. The Oregon State Director of the BLM issued a decision on April 10, 1987, not to prepare a supplemental EIS on the effects of destruction of old-growth forests in suitable spotted owl habitat. *See* Exhibit E, attached.

20. On June 10, 1987, plaintiffs appealed the Director's decision to the Interior Board of Land Appeals (IBLA), and requested that the IBLA immediately stay all sales of timber from stands older than 200 years within 2.1 mile radius circles identified on maps prepared by the defendant for each of the 289 known spotted owl habitat sites analyzed in the defendant's Spotted Owl Environmental Assessment (SOEA). The stay was necessary to preserve the status quo, to prevent illegal agency action, and to prevent further irreparable injury to the environment.

21. On July 1, 1987, the IBLA denied the plaintiffs' request for stay. The Board based its denial solely on the ground that plaintiffs had failed to show a substantial threat of irreparable injury because the record was silent as to any specific proposed timber sales that would affect the spotted owl.

22. On September 4, 1987, plaintiffs filed a renewed request for stay with the IBLA. Plaintiffs attached a list of all currently planned old-growth sales that the defendant had scheduled for offer in the next three years within a 2.1 mile radius of known spotted owl habitat sites. *See* Exhibit L, attached. In addition, plaintiffs requested a stay of all planning for timber sales, including site selection and the initiation of environmental assessments, for old-growth stands as described above, unless defendant first prepared an EIS with respect to such sales.

23. Due to the immediate and irreparable effects on the northern spotted owl and old growth ecosystems of defendant's proposed sales, plaintiffs advised the IBLA that they would view the Board's failure to act on the renewed stay request within 20 days as a denial of their request. As of the date of filing this Complaint, 20 days have expired and the IBLA has failed to act on plaintiffs' renewed stay request.

24. Between October 26 and December 31, 1987, defendant will offer 15 timber sales covering at least 1,151 acres of old-growth forests is known spotted owl habitat sites. These sales are the Lower Carnegie, Anchor Ranch, Wood Creek, and South Williams sales on the Medford District; Cougar Creek, King Creek, Lower Burnt Mountain, Brads Creek, and South Camas Valley on the Roseburg District; Long Bench II, White Wall II, and South Fork Crab sales on the Salem District; and the Vaughn's Park sale on the Coos Bay District. *See* Exhibit L.

VI. CLAIMS FOR RELIEF

COUNT I

25. Defendant's destruction of old-growth forests within suitable northern spotted owl habitat sites constitutes a major federal action affecting the quality of the human environment under the National Policy Act, 42 U.S.C. § 4321 *et seq.*

26. Defendant's destruction of old-growth forests in suitable spotted owl habitat causes cumulative, synergistic, and indirect effects that have not been examined in an adequate NEPA document.

27. Significant new information regarding the habitat requirements of the northern spotted owl has been developed since the preparation of defendant's Timber Management Plan EIS's. The decision of the director of the BLM in Oregon to proceed with continued destruction of old-growth forests in suitable spotted owl habitat, without preparing a supplemental EIS which considers significant new information regarding the effects of such destruction on the northern spotted owl, violated NEPA and 40 C.F.R. § 1502.9(c) and is subject to judicial review under 5 U.S.C. §§ 702, 706(2)(D).

COUNT II

28. Defendant's Forest Resources Policy Statement precludes defendant from withdrawing lands otherwise suitable for commercial logging in order to provide habitat for the northern spotted owl. This violates the O&C Lands Act (OCLA), 43 U.S.C. § 1181(a) and is subject to judicial review under 5 U.S.C. §§ 702, 706(2)(A).

COUNT III

29. Defendant's Forest Resources Policy Statement violated the multiple-use mandate of the Federal Lands Policy and Management Act, 43 U.S.C. § 1701 *et seq.*, and is subject to judicial review under 5 U.S.C. §§ 702, 706(2)(A).

COUNT IV

30. The destruction of old-growth forests on defendant's lands kills northern spotted owls. This violates the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 *et seq.*, and is subject to judicial review under 5 U.S.C. §§ 702, 706(2)(A).

VII. PRAYER FOR RELIEF

31. Plaintiffs respectfully request that the Court:

A. Declare that defendant's sales of old-growth timber in suitable spotted owl habitat without a supplemental EIS examining, *inter alia*, new information on the northern spotted owl, violates NEPA and 40 C.F.R. § 1502.9(c).

B. Declare that the defendant's Forest Resources Policy Statement is contrary to the Oregon and California Lands Act and the Federal Lands Policy and Management Act.

C. Declare that sales of old-growth timber which result in death of northern spotted owls violate the Migratory Bird Treaty Act.

D. Declare that defendant's actions as set forth above are not in accordance with law, contrary to 5 U.S.C. § 706(2)(A).

E. Declare that defendant's actions as set forth above are not in compliance with procedures required by law, contrary to 5 U.S.C. § 706(2)(D).

F. Enjoin defendant from offering the old-growth sales identified in paragraph 24, above, unless and until defendant complies with NEPA, OCLA, FLPMA, and the MBTA.

G. Enjoin defendant from offering any additional sales of growth forest within a 2.1 mile radius of known spotted owl habitat sites unless and until defendant complies with NEPA, OCLA, FLPMA, and the MBTA.

H. Award plaintiffs their reasonable fees, costs, expenses, and disbursements associated with this litigation.

I. Grant plaintiffs such additional and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Michael Axline
Michael Axline
/s/ John E. Bonine
John E. Bonine
Attorneys for Plaintiffs
Lane County Audubon Society,
Oregon Natural Resources Council
/s/ Victor Sher
Victor M. Sher
/s/ Todd D. True
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Legal Interns:

Lorelei Bensel
Peter James
Richard Mietz
William Young

Dated this 19th Day of October, 1987.

No. 89-931

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

PORTLAND AUDUBON SOCIETY, *et al.*,
Petitioners,

v.

MANUEL LUJAN, JR., in his official capacity as Secretary, United States Department of Interior,
and
NORTHWEST FOREST RESOURCE COUNCIL, *et al.*,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, HUFFMAN AND WRIGHT LOGGING COMPANY, FRERES LUMBER COMPANY, INC., LONE ROCK TIMBER COMPANY, INC., SCOTT TIMBER COMPANY, CLEAR LUMBER MANUFACTURING CORP., YONCALLA TIMBER PRODUCTS, INC., CORNETT LUMBER COMPANY, DOUGLAS COUNTY FOREST PRODUCTS CO., MEDFORD CORPORATION, AND ROGGE FOREST PRODUCTS, INC.

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QUESTION PRESENTED

Whether the Ninth Circuit erred in determining that section 314 of the 1988 Department of Interior and Related Agencies Appropriations bill bars judicial review in this case.

PARTIES BELOW

The following is a complete list of the parties named in the proceedings below:

Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon, and Natural Resources Defense Council, as plaintiffs-appellants below.

Manuel Lujan, Jr., in his official capacity as Secretary, United States Department of Interior, as defendant-appellee below.

Donald Hodel, in his official capacity as Secretary, United States Department of Interior, was a defendant-appellee below from 1987-1988.

Northwest Forest Resource Council, Huffman and Wright Logging Company, Freres Lumber Company, Inc., Lone Rock Timber Company, Inc., Scott Timber

Company, Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Association of O&C Counties, and Benton County as defendant-intervenors-appellees below.[1]

[1] The following parent or subsidiary corporation (not reflected in the list of parties) has an interest in the outcome of this litigation: Roseburg Forest Products, Inc.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	8
I. SECTION 314 IS A MEASURE OF LIMITED SCOPE AND DURATION; ITS INTERPRETATION DOES NOT PRESENT SIGNIFICANT ISSUES OF GENERAL IMPORTANCE.	8
II. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH PRECEDENT OF THIS COURT REGARDING STATUTORY INTERPRETATION	11
III. NEW LEGISLATION CASTS DOUBT ON WHETHER RESOLUTION OF THE ISSUE PRESENTED WILL AFFECT THE OUTCOME OF THE CASE	15
CONCLUSION	18

TABLE OF AUTHORITIES

Page

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 12

Block v. Community Nutrition Inst., 467 U.S. 340 (1984) 12

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 12

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) 8

Davis v. United States, 417 U.S. 333 (1974) 13

NLRB v. United Food and Commercial Workers Union, 484 U.S. 112 (1987) 12

Pierce v. Underwood, __ U.S. __, 108 S.Ct. 2541 (1988) 13

Portland Audubon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989) 6, 9, 13, 14

Portland Audubon Society v. Lujan, 884 F.2d 1233 (9th Cir. 1989) 7, 11, 13-15, 17

Portland Audubon Society v. Lujan, No. 87-1160-FR (D. Or.) 8

Page

Cases Continued:

Traynor v. Turnage, 485 U.S. 535 (1988) 8

United States v. Erika, Inc., 456 U.S. 201 (1982) 12

Statutes and Regulations:

Department of Interior and Related Agencies Appropriation Act, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987) 5

Department of Interior and Related Agencies Appropriation Act, Fiscal Year 1989, Pub. L. No. 100-446, 102 Stat. 1825 (1988) 5

Department of Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121 (1989) 7, 16

Federal Lands Policy Management Act, 43 U.S.C. § 1701, *et seq.* 2, 5, 7, 15, 18

Migratory Bird Treaty Act, 16 U.S.C. § 703, *et seq.* 2, 5, 7, 15, 18

Page

Statutes and Regulations Continued:

National Environmental Policy Act, 42 U.S.C. § 4321-4370 . . . . . 2, 5-7, 12-14, 18

Oregon and California Lands Act, 43 U.S.C. § 1181 . . . . . 2, 5, 7, 15, 18

Miscellaneous:

51 Fed. Reg. 30, 718-19 (1986) 10

S. Rep. No. 100-165, 100th Cong., 1st Sess. 11-12 (1987) 10

No. 89-931

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

PORTLAND AUDUBON SOCIETY, *et al.*,
Petitioners,

v.

MANUEL LUJAN, JR., in his official capacity as Secretary, United States Department of Interior,

and

NORTHWEST FOREST RESOURCE COUNCIL, *et al.*,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, HUFFMAN AND WRIGHT LOGGING COMPANY, FRERES LUMBER COMPANY, INC., LONE ROCK TIMBER COMPANY, INC., SCOTT TIMBER COMPANY, CLEAR LUMBER MANUFACTURING CORP., YONCALLA TIMBER PRODUCTS, INC., CORNETT LUMBER COMPANY, DOUGLAS COUNTY FOREST PRODUCTS CO., MEDFORD CORPORATION, AND ROGGE FOREST PRODUCTS, INC.

STATEMENT OF THE CASE

This action arises out of a decision by the Oregon Director of the Bureau of Land Management ("BLM") not to issue a Supplemental Environmental Impact Statement ("SEIS") evaluating the effect on the northern spotted owl population in western Oregon of offering some 200 timber sales containing stands of "old growth timber." Petitioners brought suit in October, 1987, alleging that offering the sales without preparing an SEIS violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4370. Petitioners also alleged violations of the Oregon and California Lands Act ("OCLA"), 43 U.S.C. § 1181, the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703, *et seq.*, and the Federal Lands Policy Management Act ("FLPMA"), 43 U.S.C. § 1701, *et seq.*

Between 1979 and 1983, the Oregon Director of the BLM adopted ten-year Timber Management Plans ("TMPs") for each of the BLM's seven districts in western Oregon. The BLM prepared an EIS for each of the seven TMPs as an integral step in the planning process. The EISs considered the environmental impacts of various timber management alternatives and

considered the potential effects of logging and habitat depletion on the northern spotted owl.

Each TMP adopts one of the alternatives proposed in its accompanying EIS. Each alternative considers different land use management options ranging from "maximum timber production" to "emphasis on protection of natural values." The alternative adopted in the TMP represents a choice among those differing land use alternatives. While the TMPs designate commercial forest land under BLM management for several different uses, the TMPs do not establish timber sale boundaries or require the BLM to sell any specific amount of timber. The TMPs decide the land use allocation of the forest and set the annual allowable harvest for each forest.

The EISs prepared for the TMPs predicted a decline in the population of northern spotted owls on BLM lands because the TMPs called for accelerated harvesting of certain old growth timber. The EISs predicted that the depletion of old growth stands would lead to a decline in the number of owls on BLM lands. The TMPs reflected this concern and adopted provisions to protect a specified number of owls.

In 1986, the BLM decided to adopt, by 1990, new

Coordinated Resource Management Plans for western Oregon, to replace existing TMPs. At about the same time, pressure from various environmental groups pointing to recent publications predicting the extinction of the northern spotted owl prompted the BLM to prepare an Environmental Assessment ("EA") analyzing whether new information warranted preparation of an SEIS to further assess the impact of timber harvests on the owl. While the EA was being prepared the BLM provided interim protection for the owl by restricting timber harvesting within a 2.1 mile radius of a known owl site.

On February 3, 1987, the spotted owl EA was completed. The EA concluded that the new information on the owl was too preliminary to support preparation of an SEIS and that the impacts of the planned timber sales on the northern spotted owl and its habitat were adequately considered in the original EISs. On April 10, 1987, the BLM issued its decision not to prepare SEISs. The decision was based on the fact that by the time the Coordinated Resource Management plans were adopted, more spotted owl habitat would be available than predicted under the EISs, and that options for protecting the owls could be considered under the new management

plans.

On June 10, 1987, petitioners appealed the decision of the BLM not to prepare a SEIS to the Interior Board of Land Appeals and requested an immediate stay of all sales within 2.1 miles of an identified spotted owl nest. On February 28, 1988, the Interior Board of Land Appeals upheld the decision not to prepare a Supplemental EIS.

Four months earlier, on October 19, 1987, petitioners filed this action alleging violations of NEPA, the OCLA, MBTA and FLPMA. Defendants subsequently moved to dismiss petitioners' complaint on the grounds that judicial review of petitioners' claims was barred by section 314 of Pub. L. No. 100-202, 101 Stat. 1329 (1987), reenacted without change as § 314, Pub. L. No. 100-446, 102 Stat. 1825 (1988). Section 314 prohibits challenges to a BLM plan "solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan," Id., but permits challenges to "any and all particular activities to be carried out under existing plans." Id. On April 20, 1988, the district court granted respondents' motion to dismiss concluding that petitioners' challenges were based on new information.

On April 21, 1988, petitioners filed a notice of appeal and moved the Court of Appeals for an injunction pending appeal. The court granted the injunction on May 18, 1988, and ordered that the appeal be expedited. On January 24, 1989, the court affirmed in part the district court decision and in part reversed it. The court remanded the case for further proceedings to consider whether petitioners' suit was a challenge to "particular activities" permitted under section 314. *Portland Audubon Society v. Hodel*, 866 F.2d 302, 307-08 (9th Cir. 1989), A-32 - A-33 ("PAS I" appearing as Petitioners' Appendix B at A-24. Citations to "A-n" herein refer to Petitioners' Appendix).

On remand, and after further factual development including a two-week hearing on the parties' cross-motions for summary judgment, the district court determined that petitioners' non-NEPA claims were barred by the equitable doctrine of laches and that the NEPA claim was not subject to judicial review under section 314 as the suit was not "a challenge to particular activities to be carried out under existing plans." The court granted respondents' motion for summary judgment.

Petitioners appealed and, on September 6, 1989,

the Ninth Circuit affirmed the district court's ruling that section 314 bars judicial review of the NEPA claim, but reversed the district court's holding that the MBTA, OCLA and FLPMA claims were barred by laches and remanded the case for trial on those issues. *Portland Audubon Society v. Lujan,* 884 F.2d 1233 (9th Cir. 1989) ("PAS II" appearing at A-1, *et seq.*).

On October 23, 1989, Congress enacted section 318 of the Department of Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121 (1989) ("§ 318"). Section 318 was the product of a lengthy negotiation process among environmentalists, the timber industry and Congress aimed at bringing an end to the timber supply crisis. In addition, section 318 was designed to moot this action and related litigation filed in the western district of Washington[2] and narrowly restrict timber sale challenges during fiscal 1990. On November 9, 1989, respondent Lujan moved to dismiss the case on the grounds that the action was rendered moot by section 318, others joined thereafter. On December 21, 1989, the district court granted

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[2] *Seattle Audubon Society v. Robertson*, Civ. No. 89-160, *Washington Contract Loggers Assoc., et al. v. Robertson*, Civ No. 89-99.

respondents' motion to dismiss, determining that section 318 rendered the case moot. *Portland Audubon Society v. Lujan*, No. 87-1160-FR, Op. at 10 (D. Or. December 21, 1989).

On December 5, 1989, petitioners filed this Petition for Writ of Certiorari to the Ninth Circuit challenging that portion of the Court of Appeals' decision which holds that section 314 bars petitioners' NEPA claims.

REASONS FOR DENYING THE WRIT

I. SECTION 314 IS A MEASURE OF LIMITED SCOPE AND DURATION; ITS INTERPRETATION DOES NOT PRESENT SIGNIFICANT ISSUES OF GENERAL IMPORTANCE.

The decision of the Ninth Circuit in this case does not present issues of sufficient significance to warrant review by this court. The decision does not implicate important principles regarding the interpretation of federal statutes. It does not create any division of authority among the circuits. *Compare Traynor v. Turnage*, 485 U.S. 535 (1988). Nor does it involve provisions of federal law which have been, or are intended to be, enduring. *See Crawford Fitting Co. v. J.T.*

Gibbons, Inc., 482 U.S. 437 (1987). Rather, the decision involves the application by a single circuit of language temporarily barring challenges to management plans which affect only western Oregon and which are scheduled to be replaced. *See discussion, supra*, at 4.

Petitioners would have this Court believe that the scope and significance of the Ninth Circuit's decision somehow exceeds the scope and duration of section 314 itself. But this contention is transparently false. The language employed by section 314, as the Court of Appeals noted, is "extraordinary." *PAS I* at A-29[3] The language bars challenges to TMPs but not to particular activities under the TMPs. This unique language

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[3] The pertinent portion of section 314 provides:

> Nothing shall limit judicial review of particular activities on the lands: Provided, however, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: Provided further, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

precludes decisions concerning section 314 from having any important general application.

The circumstances giving rise to the adoption of section 314 are also unique. The transition by BLM from one 10-year planning cycle to the next was being disrupted by a "precipitous increase in timber sale appeals and threats of litigation, especially on BLM lands in western Oregon." S. Rep. No. 100-165, 100th Cong., 1st Sess. 11-12 (1987). As a consequence, BLM was hindered in its "ability to prepare and implement new plans . . . ." *Id.* Section 314 was "intended to prevent the existing management plans from being enjoined in their entirety, solely on the basis that they are outdated, and allow activities to continue under existing plans pending the completion of new plans." *Id.*

The transitory nature of the problem section 314 was intended to address underscores the ephemeral nature of the issue this Court is asked to address. Work on the new BLM plans has already begun. *See, e.g.,* 51 Fed. Reg. 30, 718-19 (1986). The plans will consider various options for management of the forest resources in western Oregon. They will be informed by new analyses of the environmental impacts--including impacts on spotted owls--likely to be associated with various

management options. Should the BLM fail sufficiently to consider those impacts, that failure may form the basis of new challenges to the new plans.

Additional review of section 314, as urged by the petitioners, will not speed that process. It will not clarify that process. And petitioners do not intend by this action to do either. Instead, they seek to recast the balance reflected in TMPs adopted a decade ago and to shelve those existing plans while they pursue the change. *See PAS II* at A-17.

With or without petitioners' challenges, however, the BLM planning process goes forward. As it does, the significance of section 314 continues to fade, its "extraordinary" language grows increasingly narrow in its application, and the precedential value of its interpretation disappears. Even now, the question presented by the Petition is not sufficiently important to merit review by this Court.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH PRECEDENT OF THIS COURT REGARDING STATUTORY INTERPRETATION.

Petitioners assert that the decision of the Ninth Circuit is in conflict with decisions of this Court

recognizing a presumption in favor of judicial review of administrative actions. Petitioners are wrong.

While it is true that this Court has articulated a presumption favoring judicial review of administrative decisions, *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 350 (1984); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), that presumption is rebuttable. Where Congress' intention to preclude review is "fairly discernible" from express language or otherwise, that intention has been given effect by this Court. *Block v. Community Nutrition Inst.*, 467 U.S. at 349 (specific language or specific legislative history will overcome presumption favoring review); *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112 (1987) (judicial review inconsistent with statutory scheme); *United States v. Erika, Inc.*, 456 U.S. 201, 209 (1982) (absence of provision for review within precise statutory scheme provides "persuasive reason to believe" that judicial review is not intended).

Applying this Court's precedents, the Ninth Circuit properly concluded that the express language and legislative history of section 314 bar review of claims such as those petitioners have asserted under NEPA.

PAS II at A-18. The court based its decision not only on careful consideration of the section's language and its legislative history, but also on a factual analysis of the nature of the petitioners' claim. In *PAS I*, the same panel of the Ninth Circuit which decided the instant matter concluded that "[t]here is little doubt about the intent of the sponsors of section 314. The sponsors intended to stop this particular lawsuit . . . ." *PAS I* at A-31.[4] The issue for the court was whether Congress had expressed that intention clearly enough to accomplish its goal. *Id.* The determination of that issue, in the appellate court's view, depended upon whether the

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[4] Contrary to petitioners' assertions, Pet. at 12-15, the court in *PAS II* did not depart from its views as to Congressional intent expressed in *PAS I*. *Compare PAS I* at A-29 *with PAS II* at A-18. Even if this were not true, a conflict of opinion within a single circuit would not provide sufficient reason to grant the writ. *See Davis v. United States*, 417 U.S. 333, 334 (1974). Moreover, because the same panel decided *PAS I* and *PAS II*, no intra-circuit conflict can be said to exist at all. Petitioners' additional argument that the circuit court was barred from referring to the legislative history accompanying the 1988 enactment of § 314, Pet. at 16, is also baseless. No settled judicial interpretation of section 314 contradicts the statements of legislative intent accompanying the 1988 reenactment. *Cf. Pierce v. Underwood*, __ U.S. __, 108 S.Ct. 2541, 2551 (1988). In addition, the 1987 legislative history is consistent with 1988 legislative history as well as the Ninth Circuit's decision. Finally, Petitioners apparently concede that the question they present is whether the 1988 enactment of section 314 bars the NEPA claim they have raised. Pet. at i. Thus the intention of Congress in reenacting that measure is relevant to the interpretation of section 314.

petitioners' "challenge is to the plan or to particular activities." *PAS I* at A-37.

The court remanded the matter to the district court with instructions that it determine whether petitioners' challenge to approximately 200 BLM timber sales constituted a challenge to "particular activities" (and therefore fell outside the bar of section 314) or constituted a challenge to an existing plan and was barred by the provision. *PAS I* at A-30 - A-35, *PAS II* at A-18. After remand, the Ninth Circuit upheld the factual determination of the district court that the petitioners' NEPA claim was directed to the BLM plan:

> Here, if plaintiffs were to succeed on the merits of their NEPA claim, BLM would be required to suspend its management plans and prepare a supplemental EIS, addressing concerns about the northern spotted owl. . . . In this case, a supplemental EIS would consider the possible land use alternatives of designating more or less old-growth forest for "intensive timber management" or reserving it for spotted owl habitat. . . . That intentional trade-off [reflected in

> existing BLM plans] of owls for economic gain was precisely the land use decision which is being challenged by plaintiffs.

PAS II at A-17.

Based on its extensive review, and the findings of the district court, the Court of Appeals concluded that there "exists not only persuasive evidence of congressional intent, but an explicit statutory command precluding review." *PAS II* at A-18. Its analysis was both directed and controlled by decisions of this Court. Its conclusion conflicts with no decision of this Court.

III. NEW LEGISLATION CASTS DOUBT ON WHETHER RESOLUTION OF THE ISSUE PRESENTED WILL AFFECT THE OUTCOME OF THE CASE.

The Ninth Circuit's decision did not hold that section 314 barred all of petitioners' claims in this case. *PAS II* at A-19. The court determined that claims based on the OCLA, the FLPMA and the MBTA survived. On remand, however, the district court recently dismissed these claims as well, relying on section 318 of the Department of Interior and Related Agencies Appropriations Act, Fiscal Year 1990, Pub. L. No. 101-

121 (1989) ("§ 318"). *See* discussion, *supra*, at 4.

Section 318 provides in pertinent part:

> (a)(2) The Bureau of Land Management shall offer such volumes as are required in fiscal year 1990 to meet an aggregate timber sale level of one billion nine hundred million board feet for fiscal years 1989 and 1990 from its administrative districts in western Oregon.
>
> . . . .
>
> (b)(5) No timber sales offered pursuant to this section on Bureau of Land Management lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and

Wildlife and the United States Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990.

. . . .

(b)(6)(A) . . . Congress hereby determines and directs that management of areas according to subsections . . . (b)(5) of this section on . . . Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for . . . the case *Portland Audubon Society et al., v. Manual Lujan, Jr.*, Civil No. 87-1160-FR. The guidelines adopted by subsection . . . (b)(5) of this section shall not be subject to judicial review by any court of the United States.

By adopting section 318, Congress has declared that BLM management of western Oregon lands meets the requirements of NEPA, the OCLA, the FLPMA and the MBTA if that management is carried out in compliance with section 318. Section 318 has completely disposed of this action for fiscal year 1990 without regard to the interpretation of section 314. There is no reason to further review section 314.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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January 6, 1990

No. 89-931

In the Supreme Court of the United States

OCTOBER TERM, 1989

PORTLAND AUDUBON SOCIETY, ET AL., PETITIONERS

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the district court's dismissal of petitioners' claim that the Bureau of Land Management's supervision of certain forest lands in western Oregon violated the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	14
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Berenyi v. *Immigration Director*, 385 U.S. 630 (1967)	15
Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984)	7
California Fish and Game Comm'n v. *Hodel*, 18 Envt. L. Rep. (Envtl. L. Inst.) 20,141 (E.D. Cal. Oct. 29, 1987)	18
Icicle Seafoods, Inc. v. *Worthington*, 475 U.S. 709 (1986)	15
O'Neal v. *United States*, 814 F.2d 1285 (9th Cir. 1987)	2
Oregon Natural Resources Council v. *Mohla*, No. 89-35350 (9th Cir. Feb. 7, 1990)	17
Pierce v. *Underwood*, 108 S. Ct. 2541 (1988)	17
Portland Audubon Society v. *Manuel Lujan, Jr.*, Civil No. 87-1160-FR (D. Ore. Dec. 21, 1989), appeal pending, No. 90-35120 (9th Cir.)	9, 13
Skoko v. *Andrus*, 638 F.2d 1154 (9th Cir.), cert. denied, 444 U.S. 927 (1979)	2
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	15
TVA v. *Hill*, 437 U.S. 153 (1978)	18
United States v. *Dickerson*, 310 U.S. 554 (1940)	19
United States v. *Mitchell*, 109 U.S. 146 (1883)	19
United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975)	15
United States v. *Will*, 449 U.S. 200 (1980)	19
Webster v. *Doe*, 486 U.S. 592 (1988)	18

Statutes and rule:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 6
5 U.S.C. 701(a)(1) 6, 17, 18
Department of the Interior and Related Agencies Appropriations Act, 1990 (Act of Oct. 23, 1989), Pub. L. No. 101-121, Tit. III, 103 Stat. 740:
§ 312, 103 Stat. 743 6
§ 318, 103 Stat. 745-750 12
§ 318 (b) (6) (A), 103 Stat. 747 ..... 9, 13, 14, 19
Department of the Interior and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-446, Tit. III, § 314, 102 Stat. 1825-1826 6
Department of the Interior and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-202, Tit. III, § 314, 101 Stat. 1329-254 ..... *passim*
Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 18
Equal Access to Justice Act, 28 U.S.C. 2412(d) (1982 & Supp. V 1987) 19
Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* 3
Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.* 3
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 3, 14
Oregon and California Railroad Lands Revestment Act (Act of Aug. 28, 1937, ch. 876, 50 Stat. 874), 43 U.S.C. 1181a *et seq.* 2, 3
42 U.S.C. 1181a 2
Fed. R. Civ. P.:
Rule 12(b)(1) 5
Rule 12(b)(6) 5

Miscellaneous:

H.R. Conf. Rep. No. 862, 100th Cong., 2d Sess. (1988) 17
H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. (1989) 12
S. Rep. No. 410, 100th Cong., 2d Sess. 122-123 (1988) 17

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-931

PORTLAND AUDUBON SOCIETY, ET AL., PETITIONERS

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 884 F.2d 1233. The first opinion of the court of appeals (Pet. App. A24-A42) is reported at 866 F.2d 302. The opinion of the district court on remand from the court of appeals (Pet. App. A43-A124) is reported at 712 F. Supp. 1456. The initial opinion of the district court (Pet. App. A127-A144) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1989. The petition for a writ of certiorari was filed on December 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1979 and 1983, the Bureau of Land Management of the United States Department of the Interior adopted timber management plans to govern sales during the 1980s of timber on each of the several districts of BLM-managed lands in western Oregon.[1] The plans provide for the sale and harvest of substantial amounts of old-growth timber. Old-growth forests provide natural habitat for the northern spotted owl, and thus the timber management plans were accompanied by environmental impact statements which addressed, among other things, the impact of logging old-growth timber on the spotted owl population in Oregon. In April 1987, after issuing a supplemental "Spotted Owl Environmental As-

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[1] Most of these lands are revested Oregon and California Railroad and Coos Bay Wagon Road grant lands that the BLM manages under the Oregon and California Railroad Lands Revestment Act (OCLA) (Act of Aug. 28, 1937, ch. 876, 50 Stat. 874), 43 U.S.C. 1181a *et seq.* See *Skoko* v. *Andrus*, 638 F.2d 1154 (9th Cir.), cert. denied, 444 U.S. 927 (1979). OCLA provides that "timber from said lands in an amount * * * not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually * * *." 43 U.S.C. 1181a. Congress has thus dedicated these federal lands to management for the "primary use" of sustained-yield timber production. *O'Neal* v. *United States*, 814 F.2d 1285, 1287 (9th Cir. 1987). The remaining lands under BLM's management in western Oregon are public domain lands.

sessment," the BLM decided to continue logging old-growth timber as proposed in the original timber management plans. Pet. App. A133; see *id.* at A130-A133.

Petitioners, a number of environmental groups, contended that such logging would destroy the spotted owl's natural habitat and thus hasten extinction of that species. Petitioners therefore filed an administrative appeal of the BLM's decision to the Interior Board of Land Appeals. Petitioners also asked the Board to stay many of the BLM's timber sales pending the preparation and assessment of supplemental environmental impact statements concerning the effect of logging old-growth timber on the spotted owl. By October 1987, however, the Board had refused to stay the BLM's timber sales. Pet. App. A133-A135.[2]

2. a. In October 1987, petitioners filed this action against the Secretary of the Interior in the United States District Court for the District of Oregon. Petitioners contended that the BLM's decision to continue logging old-growth timber, without adequately considering the detrimental effects to the spotted owl population, violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* In addition, petitioners alleged claims under the Oregon and California Lands Act (OCLA), 43 U.S.C. 1181a *et seq.*, the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.* Petitioners sought declaratory and injunctive relief barring the Secretary from con-

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[2] In February 1988, after petitioners had filed this action, the Board issued its final decision upholding the BLM's decision. Pet. App. A57.

tinuing to implement his plans for logging old-growth timber on BLM-managed lands in Oregon. Pet. App. A135-A136; see *id.* at A159-A161.[3]

With respect to petitioners' claim under NEPA, the complaint alleged that

> [t]he limited information reviewed by the BLM in [the environmental impact statements accompanying the initial timber management plans] indicated that the logging of old-growth forests would result in a decline in the number of spotted owls on [BLM-managed] lands in western Oregon.

Pet. App. A154 (¶ 10). The complaint further alleged that "significant new information concerning the northern spotted owl" had been developed after the preparation of the BLM's initial plans, *ibid.* (¶ 11), and that the BLM neither addressed nor considered "any of the new information contained in the many studies of the northern spotted owl that have been released since the completion of [the initial environmental impact statements]," *id.* at A155 (¶ 13). Lastly, the complaint alleged that the continued sale and harvest of old-growth timber without the BLM's first preparing supplemental environmental impact statements based on such new information will cause

> old-growth forests on BLM lands in western Oregon [to] be logged at a rate that will foreclose [the Secretary's] ability to provide meaningful protection for the northern spotted owl and other old-growth dependent species.

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[3] The district court later granted motions filed by respondents, members of the Oregon timber industry, to intervene as defendants. See Pet. App. A27.

Ibid. (¶ 14). The complaint thus sought immediate declaratory and injunctive relief, alleging that "[n]ew resource management plans scheduled for 1990 will be too late to stop the irreversible effects of current old-growth forest destruction [, as permitted by the BLM's decision]." *Ibid.* (¶ 14).

b. The Secretary filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) and (6), contending, among other grounds, that Section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-202, Tit. III, § 314, 101 Stat. 1329-254, precluded judicial review of petitioners' claims. That enactment provided, in pertinent part:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. * * * [T]he Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however*, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

101 Stat. 1329-254.[4]

The Secretary contended that Section 314 barred petitioners' claims since that lawsuit sought

> to prevent the BLM from managing timber resources under existing Timber Management Plans because [those [p]lans] do not incorporate information made available subsequent to the adoption of the plans relating to the northern spotted owl and other old-growth dependent species.

Pet. App. A138.

Petitioners countered that Section 314 did not preclude their lawsuit, since that action "is not a challenge to existing land management plans in their entirety." Pet. App. A140. Moreover, petitioners contended that Section 314 "allows challenges to Timber Management Plans if the concerns raised by newly obtained information are substantive in nature." *Ibid.* Lastly, petitioners argued that Section 314 could not "repeal by implication" the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. A140.

3. In April 1988, the district court granted the Secretary's motion, holding that Section 314 "operates to preclude [petitioners'] entire action." Pet. App. A144. The district court reviewed petitioners' complaint, finding that petitioners alleged that the BLM's "Timber Management Plans are outdated as

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[4] Congress has since extended that express provision through fiscal years 1989 and 1990. See Department of the Interior and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-446, Tit. III, § 314, 102 Stat. 1825-1826; Department of the Interior and Related Agencies Appropriations Act, 1990 (Act of Oct. 23, 1989), Pub. L. No. 101-121, Tit. III, § 312, 103 Stat. 743.

they relate to the treatment of the northern spotted owl," and that petitioners based that allegation "solely upon new information which has become available since the completion of the existing Timber Management Plans." *Id.* at A142. The court therefore concluded that petitioners' complaint "contains the precise challenge that Congress intended to limit in section 314 * * * [, since] Congress intended to prohibit judicial review of challenges to existing Timber Management Plans on the basis that they do not incorporate information which has become available after the adoption of the existing * * * Plans." *Ibid.*

The district court also rejected petitioners' claim that Section 314 could not trump the availability of judicial review under the APA. In the court's view, "[t]he fact that Congress did not make a citation to the APA in limiting the review allowable does not change Congress' stated intent to limit all judicial review except as noted whether it be pursuant to the APA or another statute. Judicial review under the APA is subject to the structure of the statutory scheme under which relief is requested." Pet. App. A142-A143 (citing *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345-346 (1984)). Since Congress "has the power to limit the availability of judicial relief" under NEPA, OCLA, FLPMA, and MBTA, the court concluded that Congress, in Section 314, precluded judicial review under the APA. Pet. App. A143-A144.

Petitioners appealed the district court's order and sought a temporary injunction preventing the logging of old-growth timber pending disposition of the appeal. The court of appeals granted that request and temporarily enjoined certain logging activities in western Oregon. See Pet. App. A27.

4. In January 1989, the court of appeals reversed the district court's judgment dismissing petitioners' action and remanded the case for further proceedings. Pet. App. A24-A42.[5] The court of appeals stated that Section 314's bar to judicial review depended on an application of the following "key words"—"solely" and "information available subsequent to the completion of the existing plan." *Id.* at A30. The court then concluded that the district court had not adequately determined whether petitioners' complaint in fact relied "solely upon new information," *id.* at A33, observing that petitioners' claims under OCLA, FLPMA, and MBTA, did not appear to be based on such new information, *id.* at A32-A33. The court of appeals therefore directed the district court on remand to resolve that issue, suggesting that proof at trial might "shed light on the 'new information' problem." *Id.* at A37.

The court of appeals also concluded that the district court had not adequately considered whether the final proviso of Section 314 applied to petitioners' action, namely, "[t]hat any and all particular activities to be carried out under existing plans may nevertheless be challenged," 101 Stat. 1329-254. In the court of appeals' view, that proviso required the district court "to decide whether the challenge is to the [timber management] plan or to particular activities." Pet. App. A37. The court therefore also instructed the district court on remand to determine whether the complaint challenged the BLM's "existing plans" or "particular activities," such as timber sales, within the meaning of Section 314. *Ibid.*

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[5] The court of appeals also vacated the stay pending appeal. Pet. App. A42.

5. In May 1989, after holding an extensive evidentiary hearing on cross-motions for summary judgment, the district court granted the Secretary's motion and again dismissed petitioners' complaint. Pet. App. A43-A124.[6]

The district court, following the court of appeals' mandate, first considered whether petitioners based their NEPA claim solely upon "new information" within the meaning of Section 314. The court reviewed the record and found that

> [t]he reports and studies relied upon by [petitioners] were published after the existing Timber Management Plans and Environmental impact Statements were completed. The information contained in [those] reports and studies * * * was not available prior to the completion of the existing Timber Management Plans and Environmental Impact Statements.

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[6] The district court dismissed petitioners' claims under OCLA, FLPMA, and MBTA, on the ground that petitioners had "failed to pursue [those] claims * * * in a timely manner." Pet. App. A111. The court of appeals, however, later reversed that aspect of the district court's judgment and remanded for further proceedings. *Id.* at A19-A22. Those claims are not presented for this Court's review.

On the second remand from the court of appeals (and after the instant petition for a writ of certiorari had been filed), the district court, on December 21, 1989, dismissed as moot the remainder of petitioners' complaint in light of the recently enacted express provision of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747. *Portland Audubon Society* v. *Manuel Lujan, Jr.*, Civil No. 87-1160-FR (D. Ore. Dec. 21, 1989), slip op. 4-10. See pp. 12-13, *infra*. Petitioners' appeal from that judgment is currently pending in the court of appeals. *Portland Audubon Society* v. *Manuel Lujan, Jr.*, No. 90-35120 (9th Cir.).

Pet. App. A117. The court therefore concluded that petitioners did rely "solely upon 'new information' in [their] challenge to the BLM's decision not to issue a supplemental Environmental Impact Statement." *Ibid.*

The court then considered whether petitioners' action could nonetheless proceed under the final proviso of Section 314, that is, whether the NEPA claim was a permissible challenge to "particular activities to be carried out under existing plans," as opposed to a challenge to BLM's "existing [management] plan[s]" that Section 314 expressly precluded. 101 Stat. 1329-254. The court construed Section 314 as permitting "the BLM to operate under [its existing Timber Management Plans] pending the completion of new * * * Plans in 1990 without judicial challenges to existing * * * Plans based upon claims that new information requires different action." Pet. App. A122-A123. But Section 314, in the court's view, also "allows a judicial challenge to particular BLM activities on a case-by-case, site-specific basis." *Id.* at A123.

Here, the court determined that petitioners' NEPA claim was not such a permissible challenge to particular BLM activities because petitioners "present[ed] no new information which is site-specific to any proposed timber sale activity * * * [and did] not seek judicial review of an activity of the BLM based on site-specific new information, such as the discovery of a bald eagle nest or an arch[a]eological 'find' or a blow down of timber on a particular sale location." Pet. App. A123. The court therefore concluded that petitioners' "challenge cannot reasonably be characterized as a challenge to 'particular activity'

for which judicial review is available under Section 314." *Ibid.*[7]

In sum, the court held that Section 314 "preclude[d] judicial review because this case is based solely upon [petitioners'] claim that the Timber Management Plans do not incorporate new information available subsequent to the adoption of the plans." Pet. App. A124. In these circumstances, the court also held that "[t]he facts of this case preclude it from being deemed a challenge to a 'particular activity' of the BLM" within the meaning of Section 314. *Ibid.*

6. In September 1989, the court of appeals affirmed the district court's dismissal of petitioners' NEPA claim under Section 314. Pet. App. A1-A23; see also note 6, *supra*.[8] In the court of appeals, petitioners did not challenge the district court's finding that their NEPA claim was based solely upon "new information," and thus otherwise precluded under Section 314. Pet. App. A11. Instead, petitioners argued that the district court erroneously concluded that their claim was an impermissible challenge to existing BLM timber management plans, rather than

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[7] The court also observed that

> [i]f "particular activity" were meant to be so broad as to include [petitioners'] challenge, the statute's intent that the BLM continue under existing Timber Management Plans until new plans were completed would have no meaning.

Pet. App. A123-A124.

[8] The court of appeals considered petitioners' appeal on an expedited basis and had stayed further sales of old-growth timber over large areas of BLM-managed lands in western Oregon pending disposition of the appeal. See Pet. App. A2. The court of appeals vacated that stay when it issued its decision. See *id.* at A22.

the sort of challenge to "particular activities" that Section 314 expressly permits. *Ibid.*

The court of appeals found, as had the district court (see Pet. App. A123), that petitioners' claim was not "limited to site-specific concerns" of the sort that would be raised in challenging individual timber sales, *id.* at A15. The court of appeals further determined that "the underlying nature of [petitioners'] grievance" was a challenge to the "land use decision[]" made in each of the BLM's existing management plans. *Id.* at A16, A17. As the court explained, "if [petitioners] were to succeed on the merits of their NEPA claim, BLM would be required to suspend its management plans" pending the preparation of a supplemental environmental impact statement and reconsideration of its existing timber management plans. *Id.* at A17. The court thus held that Section 314 "precludes this kind of claim" by "explicit statutory command." *Id.* at A17, A18.

7. a. In October 1989, while petitioners' claims under OCLA, FLPMA, and MBTA were pending on remand before the district court, see note 6, *supra*, Congress enacted Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750.[9] That "extraordinary measure[]," known as the Northwest Timber Compromise, sought to "balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 87 (1989). Consequently, Section 318 "sets terms and conditions applicable only for

[9] Congress also extended Section 314 through fiscal year 1990. See note 4, *supra*.

fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old-growth forest stands." *Ibid.*

In Section 318(b)(6)(A), Congress specifically

> determine[d] and direct[ed] that management of areas according to subsections (b)(3) and (b)(5) of this section [establishing interim management standards] on * * * Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for * * * the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.

103 Stat. 747. Section 318(b)(6)(A) further provides that the guidelines for timber sales "adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." 103 Stat. 747.

b. As a result of Section 318's express provisions, the district court, on December 21, 1989, granted the Secretary's motion and dismised as moot for fiscal year 1990 petitioners' remaining claims under OCLA, FLPMA, and MBTA, "without prejudice to the filing of any new action challenging the BLM owl management activities after fiscal year 1990." *Portland Audubon Society* v. *Manuel Lujan, Jr.*, Civil No. 87-1160-FR (D. Ore. Dec. 21, 1989), slip op. 10.

c. Petitioners' appeal from the district court's judgment, which raises a constitutional challenge to Section 318(b)(6)(A), is pending in the court of appeals. *Portland Audubon Society* v. *Manuel Lujan, Jr.*, No. 90-35120 (9th Cir.).

ARGUMENT

Petitioners principally raise a narrow issue concerning the court of appeals' application of Section 314—an appropriations provision that expires at the end of the current fiscal year—to their claim under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, challenging the BLM's decision to continue logging old-growth timber in western Oregon under existing timber management plans—plans scheduled to be replaced by new coordinated plans that will govern logging during the 1990s. The court of appeals' decision, which at bottom upholds factual determinations first resolved against petitioners by the district court, is correct and does not conflict with any decision of this Court or of any other court of appeals. And, since ongoing proceedings involving another related statutory provision, Section 318(b)(6)(A), have largely eclipsed the legal and practical significance of the decision below, see pp. 12-13, *supra*, and since the Secretary is currently formulating timber management plans that will govern timber sales for the next ten-year period (once the pertinent provisions of Sections 314 and 318 have expired), petitioners' claim plainly does not warrant this Court's review.

1. Petitioners contend (Pet. 8-18) that Section 314 does not preclude their claim under NEPA because that claim challenges "particular activities" taken by the BLM under existing timber management plans. Petitioners urge that their claim thus falls within the final proviso of Section 314 that "expressly *reserves* the right to challenge 'any and all particular activities.'" Pet. 9 (emphasis in original); see p. 5, *supra*.

a. As this Court has held in an analogous context, "the facts necessary to a proper determination of the legal question whether an exemption to [a federal statute] applies in a particular case should be reviewed by the courts of appeals pursuant to Rule 52(a) [of the Federal Rules of Civil Procedure], like the facts in other civil bench-tried litigation in federal courts." *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713 (1986). Here, both the district court (Pet. App. A123) and the court of appeals (*id.* at A16-A18) found as a matter of fact that petitioners' NEPA claim amounted to a challenge to the BLM's existing timber management plans within the terms of Section 314. On the record presented, petitioners have offered no sound basis for suggesting that those findings are "erroneous," much less "clearly erroneous." And this Court has long declined to review factual findings concurred in by both lower courts. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967). This case therefore does not present an occasion for the Court to deviate from its established practice.

b. In any event, the record amply supports the pertinent findings of the district court and court of appeals, and thus petitioners err in claiming that the courts based those findings "upon an *assumption* * * * as to [petitioners'] *motives* in this lawsuit." Pet. 9 (emphasis in original). Petitioners framed their complaint as a direct challenge to the BLM's continued implementation of its existing timber management plans. The complaint challenged the BLM's decision in April 1987 "to continue logging old-growth forests as proposed in the original [timber

management plans]" and alleged that the BLM's "[n]ew resource management plans scheduled for 1990 will be too late to stop the irreversible effects of current old-growth forest destruction." Pet. App. A155 (¶ 14). And petitioners' complaint specifically sought to enjoin the BLM's continued implementation of its existing management plans until the agency complied with its alleged statutory obligations under NEPA. *Id.* at A161 (¶ 31(G)).[10]

In these circumstances, the court of appeals found, if petitioners prevailed on their NEPA claim, the "BLM would be required to suspend its management plans and prepare a supplemental [environmental impact statement], addressing [the] concerns about the northern spotted owl." Pet. App. A17. Accordingly, the record confirms that "the underlying nature of [petitioners'] grievance" was a challenge to the "land use decision[]" made in each of the BLM's existing management plans. *Id.* at A16, A17. As a result, petitioners' NEPA claim fell squarely within Section 314's prohibition against "challenges to any existing plan * * * solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan." 101 Stat. 1329-254.

c. Lastly, petitioners' NEPA claim did not fall within the final proviso of Section 314 that permits judicial review of "particular activities to be carried out under existing [timber management] plans." 101 Stat. 1329-254. Petitioners do not dispute here the district court's finding that the complaint was not

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[10] There is, of course, no more reason for this Court to review the concurrent interpretation of the complaint in this particular case by both courts below than there would be to review the concurrent factual findings of those courts.

grounded on "new information which is site-specific to any proposed timber sale activity." Pet. App. A123. Nor do petitioners challenge the court of appeals' similar finding that their claim was not "limited to site-specific concerns" of the sort that would be raised in challenging individual timber sales. *Id.* at A15. The "particular activities" proviso, however, by its terms applies only to the more commonplace "case-by-case timber sale appeals in site-specific instances" that Congress envisioned. H.R. Conf. Rep. No. 862, 100th Cong., 2d Sess. 76 (1988); see S. Rep. No. 410, 100th Cong., 2d Sess. 122-123 (1988).[11] Accordingly, as both the district court and the court of appeals correctly determined, petitioners' complaint fell outside the safe harbor proviso in Section 314. See also *Oregon Natural Resources Council* v. *Mohla*, No. 89-35350 (9th Cir. Feb. 7, 1990).

2. Petitioners also contend (Pet. 19-25) that Section 314 may not bar their complaint because that provision "repeals by implication" (Pet. 23) the judicial review provisions of the APA. The APA, by its terms, provides that judicial review under the Act is not available where "statutes preclude judicial review." 5 U.S.C. 701(a)(1). Thus, petitioners do not

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[11] Petitioners contend (Pet. 16-18) that legislative history pertaining to the reenactment of Section 314 in 1988, see note 4, *supra*, may not aid a court's construction of that provision as originally adopted in 1987. That contention lacks force where, as here, Congress reenacted the precise language of Section 314 in order to extend the identical operative provisions of the statute, and the legislative history surrounding the 1988 reenactment is fully consistent with the legislative record surrounding the original version of the statute. See Pet. App. A14 n.4. For those reasons, this Court's decision in *Pierce* v. *Underwood*, 108 S. Ct. 2541 (1988), which petitioners cite (Pet. 16-17), is inapposite.

challenge Congress's power to preclude judicial review of NEPA claims under the APA. And as this Court has made clear, Section 701(a)(1) "limits application of the entire APA to situations in which judicial review is not precluded by statute * * *." *Webster* v. *Doe*, 486 U.S. 592, 599 (1988). Here, Section 314 expressly bars judicial review of those claims that fall within its terms. See p. 5, *supra*.[12] In these circumstances, petitioners' contention breaks down. In the APA, Congress has already provided for enforcement of legislation, such as Section 314, that expressly precludes judicial review of particular statutory claims.[13]

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[12] For that reason as well, petitioners mistakenly rely (Pet. 20-21) on *TVA* v. *Hill*, 437 U.S. 153, 188-192 (1978), where the Court found no comparable statutory language exempting the federal project at issue from the requirements of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

Similarly, petitioners err in asserting (Pet. 24-25) that the government's position in this case is inconsistent with the position taken in *California Fish and Game Comm'n* v. *Hodel*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,141 (E.D. Cal. Oct. 29, 1987). There, the government contended that an appropriations provision had not repealed by implication particular statutory authority of the Secretary of the Interior. Here, however, the government has not argued that Section 314 "repealed" the APA or any other provision. To the contrary, as the court of appeals correctly held (Pet. App. A17-A18), Section 314 by its express terms merely precludes judicial review of certain types of claims—a result consonant with the APA, see 5 U.S.C. 701(a)(1).

[13] Petitioners also suggest (Pet. 22-24) that Congress cannot preclude judicial review of their NEPA claim by virtue of an appropriations measure such as Section 314. But this Court has long recognized that "when Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to

3. At bottom, this petition presents a narrow issue concerning the application of Section 314 to petitioners' NEPA claim challenging the BLM's continued logging of old-growth timber in western Oregon under existing timber management plans that have governed certain logging activities for the past decade. Section 314, however, is an appropriations provision that expires at the end of the current fiscal year, and the timber management plans challenged here are scheduled to be replaced by new coordinated plans governing logging activities during the 1990s —plans that the Secretary is currently preparing. Moreover, ongoing proceedings involving another related statutory provision, Section 318(b)(6)(A), have largely eclipsed the legal and practical significance of the decision below. See pp. 12-13, *supra*.[14] In

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an appropriation bill, or otherwise.' " *United States* v. *Will*, 449 U.S. 200, 222 (1980) (quoting *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940)); see *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883). Accordingly, petitioners cannot avoid application of the express terms of Section 314 by virtue of that provision's pedigree.

And, to the extent petitioners argue (Pet. 21) that Congress enacted Section 314 in violation of the standing rules of both Houses, petitioners should pursue that claim in the appropriate forum—the Congress, not this Court.

[14] Petitioners recently filed in the district court an application for attorney's fees and other expenses incurred in this lawsuit under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987). In that application, petitioners assert that "[t]his litigation caused Congress to adopt legislation [Section 318] providing greater protection for the spotted owl, and [petitioners] therefore prevailed." Plaintiffs' Appl. for Attorney Fees and Expenses at 11, *Portland Audubon Society* v. *Manual Lujan, Jr.*, Civil Action

these circumstances, further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1990

No. 87-1160-FR (D. Ore. filed Jan. 22, 1990). That application stated that

> Section 318 on its face directs [the Secretary] in this case to change its management practices to address the concerns raised by [petitioners] in this case, and awards a congressional "injunction" in the areas which [petitioners] seek to protect, as well as in twelve additional areas.

Appl. at 12-13. The government disputes petitioners' entitlement to fees under EAJA. Nevertheless, petitioners' recent filing in the district court—claiming that "Congress reacted to this lawsuit by awarding [petitioners in Section 318] much of the relief they were seeking in this case" (*id.* at 5 n.4)—cannot be squared with their filing in this Court asserting that further review of the Secretary's alleged violation of NEPA is necessary.

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No. 89-931

In The

Supreme Court of the United States

October Term, 1989

PORTLAND AUDUBON SOCIETY, *et al.*,

Petitioners,

v.

MANUEL LUJAN, JR., in his official capacity as Secretary, United States Department of Interior,

and

NORTHWEST FOREST RESOURCE COUNCIL, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. THIS COURT HAS FREQUENTLY GRANTED CERTIORARI TO REVIEW IMPORTANT QUESTIONS CONCERNING THE PUBLIC'S LANDS, AND SHOULD DO SO IN THIS CASE..... 2

II. THIS CASE INVOLVES IMPORTANT PRINCIPLES OF STATUTORY INTERPRETATION..... 3

III. THE NINTH CIRCUIT'S OPINION ALLOWS THE IMPLIED REPEAL OF THE JUDICIAL REVIEW PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT..... 7

IV. SECTION 318 OF THE 1990 FEDERAL APPROPRIATIONS BILL DOES NOT DIMINISH THE IMPORTANCE OF THE NINTH CIRCUIT'S RULING 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 4

Andrus v. Allard, 444 U.S. 51 (1979) 3

Andrus v. Shell Oil Co., 446 U.S. 657 (1980) 2

Andrus v. Sierra Club, 442 U.S. 347 (1979) 2

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 4

Cappaert v. United States, 426 U.S. 128 (1976) 2

Davis v. United States, 417 U.S. 333 (1974) 4, 5

Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976 (9th Cir. 1985) 6

Kleppe v. New Mexico, 426 U.S. 529 (1976) 2

National Labor Relations Board v. United Food and Commercial Workers Union, 484 U.S. 112 (1987) 4

North Dakota v. United States, 460 U.S. 300 (1983) 3

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 7

United States v. Coleman, 390 U.S. 599 (1968) 2

United States v. Klein, 80 U.S. (13 Wall) 128 (1872) 8

STATUTES

5 U.S.C. § 701(a)(1) 7

16 U.S.C. §§ 703 *et seq* 3

Pub. L. No. 101-121 9

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS

Fed. R. Civ. P. 52(a) 6

Proposed Rules on the Threatened Status for the Northern Spotted Owl, Dept. of the Interior, U.S. Fish and Wildlife Service, 54 Fed. Reg. 26666, 26675 (Friday, June 23, 1989) 3

40 C.F.R. § 1508.18(b) 6

50 C.F.R. § 10.13 3

MISCELLANEOUS

BLM Working Draft Memorandum, Dick Popp, Western Oregon District, Results of May 15, 1989, Meeting, May 16, 1989 10

ARGUMENT

Respondents' attempts to trivialize the court of appeals' decision in this case should be rejected for at least three reasons. First, the Ninth Circuit's opinion insulates from judicial review federal agency conduct that threatens to drive a species extinct. This implicates precisely the fundamental public interests on which this Court frequently bases certiorari.

Second, the Ninth Circuit departed dramatically from rules of this Court concerning interpretation of statutes that limit judicial review. The court decided to preclude judicial review based on language which it had previously found "anything but clear." Neither this Court nor any lower court tolerates revoking access to the federal courts by implication, as the Ninth Circuit did here.

Finally, respondents' argument that because appropriations bills are not proposals for permanent legislation there is no reason to consider Section 314's effect simply ignores reality. Section 314 has been enacted and reenacted – unchanged – three times by Congress. It is preventing judicial review of the destruction of ancient forests even as this brief is being written. It has become a fixture in the federal appropriations process that is routinely reenacted each year. This Court has reviewed aberrant appropriations provisions in the past, and should do so in this case.

The Ninth Circuit's ruling in this case has far-reaching implications for the relationship between the Courts and the Executive. This Court should grant this petition to review – and correct – the lower court's errors.

I. THIS COURT HAS FREQUENTLY GRANTED CERTIORARI TO REVIEW IMPORTANT QUESTIONS CONCERNING THE PUBLIC'S LANDS, AND SHOULD DO SO IN THIS CASE

This Court has often "granted certiorari because of the importance of [a] question to the management of the public lands," *Andrus v. Shell Oil Co.*, 446 U.S. 657, 663 (1980); *United States v. Coleman*, 390 U.S. 599, 601 (1968). Certiorari has been granted, for example, where (as here) statutory interpretation affects local wildlife species and their habitat, *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (Devil's Hole Pool and its rare fish inhabitants are protected "objects of historic or scientific interest"), where (as here) the trustee relationship between Congress, the public and our nation's public lands is involved, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (Congress has the power to protect wildlife on the public lands), and where (as here) the appropriations process raises questions about the applicability of environmental statutes. *Andrus v. Sierra Club*, 442 U.S. 347 (1979) (appropriations are not proposals for legislation requiring EIS revisions).

The interests at issue in these past public land cases, while significant, pale in comparison to the interests involved in this case. Northern spotted owls – whose old-growth habitat predates our Nation's history – face a significant risk of extinction. The United States Fish and Wildlife Service has recognized:

> Impacts from timber harvesting are rangewide and, in addition to causing the direct loss of preferred habitat, appear to be affecting the quality of the remaining forest habitat throughout much of the species' range. . . . Current and proposed management practices may not be designed for nor be sufficient to ensure long-term

> population viability of the spotted owl. On the basis of the best scientific and commercial data available, the Service believes that threatened status is warranted rangewide for the entire population of the northern spotted owl.

Proposed Rules on the Threatened Status for the Northern Spotted Owl, Dept. of the Interior, U.S. Fish and Wildlife Service, 54 Fed. Reg. 26666, 26675 (Friday, June 23, 1989).

In addition, the spotted owl is a migratory bird[1] protected internationally by the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 *et seq.*, a conservation statute "designed to prevent the destruction of certain species of birds." *Andrus v. Allard*, 444 U.S. 51, 52 (1979). "The protection of migratory birds has long been recognized as a 'national interest of very nearly the first magnitude.' " *North Dakota v. United States*, 460 U.S. 300, 309 (1983) *quoting Missouri v. Holland*, 252 U.S. 416, 435 (1920).

This case involves illegal agency action[2] contributing to the risk of extinction of a species. The interests involved amply warrant this Court's attention.

II. THIS CASE INVOLVES IMPORTANT PRINCIPLES OF STATUTORY INTERPRETATION

Contrary to respondents' argument that the Ninth Circuit's opinion does not implicate important principles of statutory interpretation (NFRC Brief at 8), the Ninth Circuit's ruling creates a *direct* conflict with this Court's prior decisions. Those decisions recognize a "strong

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[1] *See* 50 C.F.R. § 10.13.

[2] The district court has determined that the defendant's refusal to prepare a supplemental EIS pursuant to NEPA was "arbitrary and capricious." App. C at 114-15.

presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). This Court has repeatedly stated that where there is "substantial doubt" about congressional intent to preclude judicial review in a particular case, the presumption favoring judicial review is controlling. "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) *quoting Rusk v. Cort*, 369 U.S. 367, 380 (1962).

The Ninth Circuit did *not* find, as it was required to do by these previous opinions of the Court, that statutory preclusion of judicial review was demonstrated "clearly and convincingly." *National Labor Relations Board v. United Food and Commercial Workers Union*, 484 U.S. 112, 131 (1987). In fact, the Ninth Circuit specifically found in its *first* opinion that § 314 *was* ambiguous and that there *was* substantial doubt about Congressional intent. In that opinion the Ninth Circuit concluded:

> The Section purports in one sentence to take away the jurisdiction of the district courts to hear challenges to "existing plans," while in a following sentence providing "further that any and all particular activities to be carried out under existing plans may nevertheless be challenged." The trial court interpreted this extraordinary language as a clear withdrawal of jurisdiction. *We find it anything but clear.*

App. B at A-29 (emphasis added).[3]

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[3] NFRC, in an attempt to downplay the fact that the Ninth Circuit's two opinions in this case contradict each other, cites to *Davis v. United States*, 417 U.S. 333 (1974) for the proposition

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Section 314 by its terms prohibits only challenges to "plans in their entirety" based "solely" on new information. Section 314 expressly reserves the right to challenge "any and all particular activities to be carried out under . . . plans. . . ."[4] Despite the fact that this case challenges timber *sales*, and not timber *plans*, respondents claim that the lower courts were not clearly erroneous in finding that the case challenges timber management plans.

The complaint was appended to the petition for certiorari because even a cursory review of the complaint reveals that it does *not* seek to enjoin implementation of a timber management plan in its entirety. App. E at A-145. The Ninth Circuit's (first) opinion concedes that "the sales [being challenged in this case] are indeed *separate transactions*. They are also *part of* an existing plan . . . " App. B at A-29. For the court to then conclude that § 314, which expressly reserves the right to challenge "any and all particular activities to be carried out under . . . plans . . . " applies to this case, is transparently *wrong*, and directly violates this Court's rules of statutory

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that a conflict within a single circuit does not warrant a writ of certiorari. NFRC Brief at 13. But this Court *has* granted certiorari in cases where there are intracircuit conflicts, and in fact granted such a writ on a second petition for certiorari in *Davis* itself. *Id.* at 341. The language which NFRC cites in *Davis* is not in any event a holding of *Davis*, but simply an argument presented in *Davis*.

[4] Section 314 is but one paragraph in a massive, 450 page appropriations bill. The committees in the House and Senate which oversee judicial review, public lands, and wildlife never even considered § 314.

construction.[5] *Nothing* in § 314 indicates that Congress intended to bar this lawsuit.

The distinction between "plans" and activities *implementing* those plans is well-established. For example, 40 C.F.R. § 1508.18(b) (which implements NEPA) defines "major Federal actions" as:

> (2) Adoption of formal plans, such as official documents prepared by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.
>
> (3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; . . . [and]
>
> (4) Approval of specific projects, such as . . . management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

Timber sales clearly fall within categories (3) and (4), *not* within category (2)'s definition of "plans."

The Ninth Circuit's opinion in this case so flagrantly violates the rules of statutory construction established by this Court that certiorari should be granted to correct the opinion.

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[5] The BLM argues that the facts in this case should be reviewed by the court of appeals pursuant to Fed. R. Civ. P. 52(a) as in civil bench-tried litigation. BLM's Brief at 15. This case, however, was decided on a motion for summary judgment and *not* after a trial. The lower court's opinion should therefore be reviewed *de novo* to determine whether any genuine issue of material fact remains for trial and whether the substantive law was correctly applied. *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 981 (9th Cir. 1985).

III. THE NINTH CIRCUIT'S OPINION ALLOWS THE IMPLIED REPEAL OF THE JUDICIAL REVIEW PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT

Respondents dismiss the fact that the Ninth Circuit's opinion impliedly repeals the judicial review provisions of the Administrative Procedures Act (APA),[6] by contending that 5 U.S.C. § 701(a)(1), by its terms, provides that judicial review under the Act is not available where "statutes preclude judicial review." BLM's Brief at 17. Therefore, respondents argue, the Ninth Circuit's interpretation of § 314 to preclude judicial review in this case does not impliedly repeal the APA. This argument is circular. Section 701(a)(1) applies only *after* a court has determined that a statute precludes review. *If* § 314 unambiguously precluded judicial review in this case, 5 U.S.C. § 701(a)(1) would be relevant. Section 314, however, *is* ambiguous. Respondents ask the Court to use § 701(a)(1) as an excuse for ignoring the rule against implied preclusion. There is no authority for such a proposition.[7]

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[6] This Court has repeatedly found implied repeals to be repugnant. The Court's general rule disfavoring repeals by implication applies "with *greater* force when the claimed repeal rests solely on an Appropriations Act." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978).

[7] An appropriations measure, in any event, should not be allowed to repeal the judicial review provisions of the APA except under the most extreme circumstances.

IV. SECTION 318 OF THE 1990 FEDERAL APPROPRIATIONS BILL DOES NOT DIMINISH THE IMPORTANCE OF THE NINTH CIRCUIT'S RULING

Respondents argue that "another related statutory provision, Section 318(b)(6)(A), [has] largely eclipsed the legal and practical significance of the decision below." BLM's Brief at 19. It is not clear precisely what this means. The defendant does not claim that this case has been *mooted* by § 318(b)(6)(A), as indeed it could not, since § 318 precludes judicial review *only* of the legality of the guidelines set forth in § 318 itself, and does *not* preclude judicial review of challenges to timber sales or other decisions of the defendant.[8] And the BLM provides no additional clues as to the source of the legal theory

[8] Section 318 does purport to find, as a *factual* matter, that the defendant's "agreement" with the Oregon Department of Fish and Wildlife is "adequate consideration for the purpose of meeting the statutory requirements that are the basis for . . . the case of Portland Audubon Society et al. v. Manuel Lujan, Jr., Civil No. 87-1160-FR." Plaintiffs have challenged the constitutionality of this language, because it represents an attempt by Congress to decide the facts of a pending case. Such an exercise is an impermissible intrusion upon the core powers of the judiciary. *See United States v. Klein*, 80 U.S. (13 Wall) 128 (1872). The Ninth Circuit is currently considering this constitutional issue in two cases that have been consolidated on appeal; *Portland Audubon Society v. Lujan*, Ninth Cir. No. 90-35120, and *Seattle Audubon v. Robertson*, Ninth Cir. Nos. 90-35020, 90-80008. It is likely that, whichever way the Ninth Circuit rules on the constitutionality issue, this Court will be asked to consider that constitutional question as well.

that a case may be "eclipsed" by succeeding legislation.[9] If § 318 "eclipsed" § 314, it would not have been necessary for Congress to reenact § 314 (as § 312) in the same bill as § 318.

Respondents also argue certiorari should be denied because the case does not involve "enduring" provisions of federal law. NFRC Brief at 8; BLM's Brief at 19. But § 314 has been allowed to block citizens' access to the courts since 1987.[10] The provision has become a fixture in the appropriations process, and will "endure" until addressed by the Court.

Respondents' invitation to ignore § 314's repeated reenactment is disingenuous. The BLM is unlikely to change its conduct voluntarily. Despite representations to the Court that new plans and EIS's will be completed in 1990, a Bureau of Land Management memorandum states that completion may take years:

> it is becoming evident that because of the difficulties of building a EIS process that will be effective for Western Oregon the RMP [Regional Management Plan] will not be completed until FY 92 and implementation of new allowable

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[9] Respondents contend that Petitioners filing for attorney's fees does not "square" with the filing of this petition for certiorari. BLM's Brief at 20. Apparently respondents believe that, because plaintiffs prevailed *in part* and therefore applied for fees, they must forego their right to challenge the rulings in this case with which they did *not* agree. This is nonsense. A challenge to a specific ruling is not prohibited simply because other rulings went in the challenger's favor.

[10] Section 314 was originally enacted as H.J. Res. 395, § 314. It was reenacted without change as H.R. 4867 in 1988 and again reenacted without change in 1989. This legislation endures in 1990 as § 312 of H.R. 2788 and is found in Pub. L. No. 101-121.

> sales quantities will not occur before FY 93. Legal challenges to the RMP and associated allowable cut could result in this date being extended even further.

BLM Working Draft Memorandum, Dick Popp, Western Oregon District, Results of May 15, 1989, Meeting, May 16, 1989, at 9.

CONCLUSION

The northern spotted owl is in danger of extinction. As an indicator species for the ancient forests of the Northwest, the owl acts as a canary in the mine shaft. The use of the appropriations process to foreclose judicial review of agency compliance with environmental laws applicable to ancient forests raises issues of clear national significance. This Court should grant certiorari to review that process and those principles.

Respectfully submitted,

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